In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 410

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIFFORD J. O. NELSON, GRETA C. CARLSON, and KENNETH A. H. NELSON,

APPELLANTS,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants have appealed from a final judgment of the United States District Court for the District of Mas-

sachusetts which dismissed their suit to enjoin and set aside certain orders of the Interstate Commerce Commission. They submit this Statement to show that the Supreme Court of the United States has jurisdiction of their appeal and that substantial questions are presented thereby.

Opinions Below

The opinion of the District Court for the District of Massachusetts, which contained its findings of fact and conclusions of law, is reported at 196 F. Supp. 351. The Report of the Interstate Commerce Commission on Reconsideration is printed at 80 M.C.C. 257; the Prior Report by Division 4 is printed at 75 M.C.C. 45; the Report of the Examiner is unpublished. Copies of the opinion and judgment of the District Court and of the Report of the Examiner are attached as Appendix A hereto.

Jurisdiction

This suit was brought in the court below pursuant to 28 U.S.C. § 1336 and 49 U.S.C. § 17(9) (54 Stat. 916 (1940)), and was heard and determined by a district court of three judges as required by 28 U.S.C. § 2325. The judgment of the District Court was entered on July 18, 1961, and notice of appeal was filed in that Court on September 11, 1961. The jurisdiction of the Supreme Court of the United States to review that judgment on this direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and has been sustained in, e.g., *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173; *County of Marin* v. *United States*, 356 U.S. 412; *McLean Trucking Co.* v. *United States*, 321 U.S. 67.

Questions Presented

a. In a proceeding for judicial review of a decision of the Interstate Commerce Commission, did the District Court err by affirming the Commission upon grounds different from those relied upon by the Commission, in that

(1) the District Court made new findings of fact which were contrary to the findings made by the Commission and further presumed that facts which were not proved in an investigation proceeding before the Commission were unfavorable to the respondents therein?

(2) the District Court rejected certain other facts upon which the Commission may well have relied, but nevertheless refused to remand the case to the Commission for reconsideration?

(3) the District Court employed a finding of ultimate fact and a legal theory both of which were different from those upon which the Commission had decided the case?

b. Did the Commission fail to comply with the essential requirements of the Administrative Procedure Act, the Interstate Commerce Act and the decisions of this Court, in that

(1) the Commission's Report merely states in narrative form a number of facts (including many trivial, irrelevant, innocent and ambiguous matters), and then, without any reasoning or other indication of which facts were considered important, asserts an ultimate conclusion?

(2) the Commission has entered a remedial order without having made any adequate finding of the

requisite fact that a violation of section 5(4) of the Interstate Commerce Act is continuing?

(3) the Commission has ordered divestiture of a specified carrier without having found that such divestiture is necessary?

c. Did the Commission err in ruling that the fact that a violation of law has been found requires denial of an application for approval of a proposed merger

(1) even if the public interest dictates approval of the proposed merger?

(2) even if the supposed violation found was innocent?

d. Did the District Court err in affirming the Commission's decision without finding or being able to find that the Commission's decision or its findings were supported by substantial evidence on the whole record?

Statutes Involved

Relevant parts of sections 7(c), 8(b), and 10(e) of the Administrative Procedure Act (60 Stat. 241, 242, 243; 5 U.S.C. §§1006(c), 1007(b), 1009(e)) and of sections 5(2), 5(4), 5(5), 5(6), and 5(7) of the Interstate Commerce Act, as amended (54 Stat. 905, 907, 908; 63 Stat. 485; 49 U.S.C. §§5(2), 5(4), 5(5), 5(6) and 5(7)) are set forth as Appendix B hereto, and are hereinafter cited by act and section number alone.

Statement

On October 6, 1955, more than six years ago, two incorporated interstate motor carriers, The L. Nelson & Sons Transportation Company (hereinafter called Nelson Co.)

and Gilbertville Trucking Co., Inc. (hereinafter called Gilbertville Co.) filed with the Interstate Commerce Commission a joint application pursuant to section 5(2) of the Interstate Commerce Act. The application sought Commission approval of a proposed transaction by which Nelson Co. would acquire control of Gilbertville Co. (through an exchange of stock and subsequent merger of the two carriers) and derivative control of Gilbertville Co. would be acquired by Nelson Co.'s two principal stockholders, Charles G. Chilberg and Clifford J. O. Nelson, who are also directors and respectively president and treasurer and secretary and assistant treasurer of Nelson Co.

Nelson Co., a Connecticut corporation domiciled at Ellington, Connecticut, does business as a common carrier by motor vehicle in interstate commerce. It holds irregular route authority to transport general commodities intrastate in Connecticut and Massachusetts and specified commodities associated with the manufacture of cloth interstate between certain points in New England and certain other points in New England, New York, New Jersey and Pennsylvania.

Gilbertville Co. is a Massachusetts corporation domiciled at Gilbertville, Massachusetts. It is a common carrier by motor vehicle in interstate commerce authorized to carry general commodities over regular and irregular routes within Massachusetts and over irregular routes between certain points in Massachusetts certain points in New York, New Jersey, Connecticut and Rhode Island and to carry specified commodities over some regular and some irregular routes among certain points in New England, New York, New Jersey and Delaware.

On December 20, 1955, two and a half months after the application was filed, the ICC, acting under section 5(7) of the Interstate Commerce Act, initiated an investigation

to determine whether control and management of the two carriers in a common interest had already been effectuated in violation of section 5(4) of the Interstate Commerce Act. The respondents named in the investigation proceeding were the two corporate and two individual applicants and, in addition, Kenneth A. H. Nelson, who is president, treasurer and a director of Gilbertville Co. and beneficial owner of all of its stock, and Greta C. Carlson, the minority shareholder, a director and vice-president of Nelson Co.

Proceedings on the application and proceedings on the investigation, numbered respectively MC F-6099 and MC-F-6178 on the dockets of the ICC, were consolidated for hearing and decision. The two proceedings were further commingled in the Commission's decision, for the decision in the investigation proceeding eventually became the sole reason for denial of the application.

After a lengthy hearing held in September of 1956, the Examiner concluded that the application should be granted, thus rendering the investigation moot: He found that "the case in hand appears to be on the borderline" with respect to the alleged violation of section 5(4) (p. A-62, *infra*), but, relying upon the statutory conclusive presumptions of sections 5(5) and 5(6) of the Interstate Commerce Act, he held that control and management of Nelson Co. and Gilbertville Co. in a common interest "were effectuated" and "are *presumably* continuing." (pp. A-62 — A-63, *infra*; accord, p. A-69, *infra*) (Emphasis added.) Nevertheless he found that the proposed merger should be approved pursuant to section 5(2) because it would be in the public interest. (p. A-79, *infra*) The Examiner expressly found that the merger would not be harmful to competition[1] and, on the basis of his personal observation

[1] Gilbertville Co. and Nelson Co. are both small carriers, especially compared to the large carriers and groups of carriers with whom they must compete. (see pp. A-50 — A-58, A-76, *infra*)

of the individual applicants in the hearing before him, that the applicants were not unfit:

> In the case at bar, there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown and the circumstances in which they occurred do not establish a persistent disregard for regulation. Rather, they appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not wilfulness. *The principals are youthful and are of such caliber that their experiences at the hearing herein can be expected to make them more cognizant of and responsive to regulation.* They earnestly deny that what has been done in respect of Gilbertville and Nelson amounts to effectuation of control in a common interest and on this record their view on that point cannot be said to be wholly groundless. Such control is not the result of any one act or transaction, but is the result of an evolution and a cumulation of acts, transactions and practices, the ultimate consequence of which may not be readily obvious to the layman. *A finding of unfitness by reason of violations is not warranted.*" (p. A-72, *infra*) (Emphasis added.)

Division 4, by a two-to-one decision, also held that section 5(4) had been violated, although it never even cited the presumptions of sections 5(5) and 5(6); instead, Division 4 based its "finding in this respect . . . on the entire chain of circumstances revealed by the record". (75 M.C.C. at 53) Ignoring the Examiner's finding of fact that the applicants were not unfit (although it had adopted the Examiner's factual statements "as our own" (75 M.C.C. at 46)), Division 4 denied the section 5(2) application be-

cause "a violation of the law should not be rewarded, . . . existing carriers endeavoring faithfully to comply with the law should be encouraged and protected" and "violations of the law and of the regulations should not be 'blessed' by approval". (75 M.C.C. at 54) Division 4 ordered that the respondents "terminate the violation of the provisions of section 5(4)". (Complaint, App. F at 18; R. 3, 60)

The Commission recalled the proceedings from Division 4 after they were reopened on appellants' petition for reconsideration. In the resulting Report, to which four of the eleven Commissioners agreed,[2] the Commission relied upon the conclusive presumptions of sections 5(5) and 5(6):

> "*Considering all the facts of record*, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson [Co.] within the meaning of section 5(6) at the time he purchased the stock of Gilbertville [Co.] and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson [Co.] and Gilbertville [Co.] in a common interest has been effected and is continuing in violation of section 5(4) of the act." (80 M.C.C. at 264-65) (Emphasis added.)

Then the Commission, adopting the language used by Division 4, denied the section 5(2) application solely because it inferred "unfitness" from the violation of section 5(4) it had conclusively presumed. (80 M.C.C. at 265-66) However, the Commission's order not only reinstated

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[2] Four of the eleven members of the Commission constituted the majority; another concurred only in the result. Three Commissioners dissented and another who had dissented from the decision of Division 4 was among the three who did not participate in the full Commission's decision.

all the terms of Division 4's order, including the requirement that the respondents "terminate the violation of section 5(4) of the Interstate Commerce Act," but also

> "*further ordered*, That the said respondents be, and they are hereby, required to divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc. . . . ." (Complaint para. 1 & App. B; Answer para. 1; R. 3).

The Report of the Commission contains not a single word of justification or explanation of that addition.

After both a petition for reconsideration and a petition suggesting an alternative to the divestiture ordered had been summarily denied by the Commission, the appellants filed their Complaint seeking judicial review by the United States District Court for the District of Massachusetts, whereupon, on appellants' petition, the Commission postponed the effective date of its order. The appellants urged in the District Court, as they had urged before the Commission, that the Commission's decision was inconsistent with the relevant provisions of both the Administrative Procedure Act and the Interstate Commerce Act and wholly without support either by adequate basic findings or by substantial evidence on the whole record.

The District Court rejected each contention: First, after making certain *de novo* findings of fact in what it called a "syllabus", the District Court copied from defendants-appellees' brief "in full the essential portion of the text" of the Commission's Report "with the supporting transcript references conveniently supplied by defendants": (196 F. Supp. at 356). The District Court held that the Commission made sufficient findings and that the Commission's statements were "supported by evidence" (196 F. Supp. at 359). Secondly, appraising its *de novo* findings

of fact as well as the Commission's statements, the Court held that the ICC's ultimate conclusion that section 5(4) was violated is "inevitable to an unprejudiced, sophisticated mind" and affirmed that ultimate conclusion. (196 F. Supp. at 360) But, although the Commission had relied upon the conclusive presumptions of sections 5(5) and 5(6), the District Court's "reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (196 F. Supp. at 360) Finally, according to the District Court, no findings or reasoning were necessary to support the divestiture order, and denial of the section 5(2) application merely because a section 5(4) violation had been found was "a clearly proper exercise of a delegated discretionary authority." (196 F. Supp. at 362)

The significant basic facts are stated hereinafter where they are relevant to the showing that the questions presented by this appeal are substantial.

The Questions Are Substantial

The new and unusual rules of law invoked by the Commission in the present case required the District Court to explore virgin territory in the Interstate Commerce Act. But, because the Commission completely failed to blaze its trail with the required basic findings and reasons neither the parties nor the reviewing courts can know exactly what path the Commission took through that virgin territory. Confronted with a decision that was thus, as a practical matter, unreviewable, the District Court ignored its role of judicial review and its attendant responsibilities. Instead of remanding the case to the Commission for compliance with the requirements of the Interstate Commerce Act and the Administrative Procedure Act, as numerous decisions of this Court, such as *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, required it to

do, the District Court found new basic facts of its own, contrary to the facts found by the Commission, found its own new ultimate fact, evolved its own legal theories, and then, ironically, purported to affirm the Commission's result.

Three areas of the Commission's decision were thus unreviewable and unreviewed: First, the Commission invoked the rarely used conclusive presumptions of sections 5(5) and 5(6) of the Interstate Commerce Act, but it gave no indication of what "relationship" it had found as a fact upon which to base those conclusive presumptions. But by deciding the case on different grounds which did not involve sections 5(5) and 5(6), the District Court failed to review the important questions of what "relationship" the Commission had found and of whether that "relationship" was sufficient to invoke the presumptions. Second, although a continuing violation of section 5(4) is a prerequisite to the Commission's jurisdiction pursuant to section 5(7) of the Interstate Commerce Act to order remedial action, the Commission imposed a remedial order without having made any adequate finding that any violation was continuing. Third, the Commission not only ordered remedial action, but it imposed the most drastic remedy known—complete divestiture. Yet the Commission said nothing to justify the divestiture order and does not appear even to have considered whether it was necessary. The District Court, claiming support only by misconstruing this Court's recent decision in *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, swept aside the requirement of both the express words of section 5(7) and many decisions of this Court that divestiture not be ordered unless and until it be found necessary.

The Commission in two ways extended and changed its doctrine (which had never been sustained by any court even in its original form) that "fitness" is a criterion to

be considered in section 5(2) proceedings for approval of proposed mergers. Disregarding the Interstate Commerce Act and the national transportation policy, the Commission promoted its "unfitness" doctrine to the status of an absolute rule requiring denial of a section 5(2) application even if the proposed merger would be in the public interest. And then *sub silentio* extending that "fitness" doctrine beyond the bounds of reason, the Commission held that any violation of law, however innocent, equals "unfitness".

Finally, not only is the record without substantial evidence to support the Commission's findings and decision, but the District Court did not even purport to find the Commission's decision or findings supported by substantial evidence on the whole record.

A. *The District Court did not review the Commission's decision; instead, disregarding the rule of the first Chenery case, it decided the case de novo.*

The court below abdicated its responsibilities pursuant to section 10 of the Administrative Procedure Act; it stepped down from the bench of a reviewing court and usurped the factfinding and decision-making functions committed by Congress to the Interstate Commerce Commission. Instead of reviewing the Commission's decision, the District Court based its decision in the present case upon grounds entirely different from those relied upon by the Commission. In this respect the District Court's decision is squarely contrary to the principle enunciated by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, and reiterated frequently, see, e.g., *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, that "the grounds upon which an administrative order must be judged are those upon which the record discloses

that its action was based." (318 U.S. at 87; see 363 U.S. at 270)

Nor is the District Court's decision justified because it reached the same result as the Commission had reached and therefore purported to affirm the Commission. This Court made clear in the *Chenery* case that a reviewing court may not affirm an administrative agency's decision on grounds different from those relied upon by the agency:

> "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' . . . But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, *a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.*" (Emphasis added.) 318 U.S. at 87-88; see *National Labor Relations Board* v. *Lundy Mfg. Corp.*, 286 F.2d 424, 426 (C.A. 2, 1960).

The failure of the District Court in the present case to confine its "review to a judgment upon the validity of the

grounds upon which the Commission based its action" is clear. Indeed, the basic facts, the ultimate fact, and the legal theory upon which the District Court predicated its decision were all different from those relied upon by the Commission.

1. The basic facts considered by the District Court were so different from those upon which the Commission had based its decision that the District Court really decided a hypothetical case of its own making instead of the case presented to it for review. The District Court created these differences in two ways: (a) it in effect overruled a number of the Commission's findings of fact on crucial matters and substituted new findings of its own which were contrary to or inconsistent with the findings of the Commission; and (b) it rejected as "trivial to the point of demonstrable irrelevance", "innocent" and "ambiguous" some of the facts upon which the Commission had relied.

(a) The District Court began its discussion of the present case by setting forth in what it called "a syllabus" the basic facts it deemed most significant. (196 F. Supp. at 356) More than half of the statements in that "syllabus" are demonstrably inconsistent with the facts found by the Commission.[3]

First, the "syllabus" "shows a close business relationship between Kenneth A. H. Nelson, his mother, and her six other children" by saying, "Originally they were all associated as shareholders in the Nelson Co." But the Commission had found (in accordance with the undisputed evidence) that three of the seven children became shareholders only when Mrs. Nelson died in 1950 and her

[3] Because so many of the District Court's findings of fact in the "syllabus" were inconsistent with the Commission's findings, however, the brevity appropriate to this Statement does not permit discussion of all such findings.

stock . . . was devised, 42 shares each". (80 M.C.C. at 263; see Pl. Ex. A Tr. 30-32,[4] R. 2, 60)

Second, the "syllabus" finds, "In 1952 Kenneth was still the owner of 92 of the 500 shares of the Nelson Co." The undisputed evidence, however, showed not only that Kenneth at no time owned more than 50 shares of Nelson Co. stock, but also that Kenneth owned *no* such stock at any time in 1952: on September 22, 1951 Kenneth sold all Nelson Co. stock he then owned (50 shares) and contracted to sell at an established price the 42 shares which he expected to receive from his mother's estate; on January 24, 1953, when the estate was distributed, the stock was delivered to Kenneth's vendee pursuant to the contract to sell. And the Commission so found. (80 M.C.C. at 263; see Pl. Ex. A Tr. 32-33A, 36-38, 43-44, R. 2, 60)

Third, the "syllabus" contradicted the Commission when it found "At four . . . terminals [other than the New York terminal] . . . Gilbertville Co. was a sublessee of Nelson Co.", whereas the Commission correctly found such subleases at only three terminals other than New York, to wit, at "Rockville-Ellington, Newton, Mass., and Woonsocket, R.I." (80 M.C.C. at 263)

Fourth, the "syllabus" makes some remarkable assertions about Kenneth's eighteen-month long career:

> "as a 'tariff consultant.' The nature of this relationship and of this work is not precisely shown. Kenneth claims he held himself out not as an employee or officer but as an independent contractor; yet if he had clients other than Nelson Co. they were not shown. Moreover, in his work for Nelson his duties (properly

[4] Inasmuch as the entire record of proceedings before the Commission was marked as one exhibit (R. 60), citations to the portion of that exhibit constituting the transcript of testimony before the Commission's Examiner are denoted herein by the abbreviation "Tr."

inferable from his title, his rate of compensation, and miscellaneous specific minor incidents,[5]) trench upon administrative or executive rather than strictly independent professional advisory functions."

Those assertions flatly contradict the Commission's finding that during the eighteen-month period Kenneth was "a 'free lance' tariff consultant". (80 M.C.C. at 263) The District Court not only deleted, but also completely ignored, the Commission's finding that Kenneth was "free lance". Although the term "free lance" may be colloquial, its meaning is clear; by using the adjective "free lance" the Commission unambiguously found that Kenneth was an independent contractor.[6] Moreover, the profession of "tariff consultant" is an established one,[7] well known within

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[5] But the record contains neither any finding nor even any evidence of any "specific minor incidents" while Kenneth was a free lance tariff consultant. And the record does show, by uncontradicted evidence, that Kenneth had no "rate of compensation"; like any other independent professional, Kenneth was paid when, from time to time, he rendered statements for his fees. (Pl. Ex. A Tr. 181; R. 2, 60) Inasmuch as "his title" shows that Kenneth was exactly an "independent professional" advisor, it is plain that whatever "inference" the District Court may have made was without any basis in fact and could have been no more than imagination. Moreover, it is typical of the vagueness of the District Court's opinion that, despite the assertions as to Kenneth's duties being "inferable" and as to what they "trench upon", there is no indication of what the District Court imagined those duties to have been. The characterizations, apparently borrowed from the wage and hour law (see 52 Stat. 1067 (1938), 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.1, 541.2, 541.3), are not illuminating.

[6] That finding was required by the uncontradicted evidence. For example, a public accountant who was one of the witnesses described Kenneth as "an independent, just the same as myself, . . . who holds himself out to do a certain classified work". (Pl. Ex. A Tr. 28, 270; R. 2, 60) Moreover, the title "consultant" also shows that Kenneth was an independent contractor. See, e.g., *State* v. *E. J. Doyle & Co.*, 96 Atl. 605, 610 (R.I. 1916); *Gulf & Southern Transportation Co., Inc.*, — Extension — Century, Florida, 71 M.C.C. 1, 2 (1957).

[7] For example, there is a separate listing "tariff consultants" in the Classified Section of the Washington, D.C. telephone directory. And

the transportation industry where the Commission is expert; the Commission was no more required to explain what a free lance tariff consultant does than the District Court was required to elaborate upon the title "a public accountant", which it used in its "syllabus". And, even if the Commission had erred in failing to define "a 'free lance' tariff consultant", such an error would not have given the District Court license to speculate.

The District Court's assertions about Kenneth's career as a free lance tariff consultant are inconsistent with the Commission's findings in still another respect. For the obvious contradictions of the Commission's finding that Kenneth was a free lance tariff consultant are just the woof which the District Court threaded through the warp of an erroneous view of the burden of proof in weaving the fabric of those assertions. The warp may be seen in the statements that certain things "were not shown", wherefore (the District Court patently has inferred) the facts if shown would have been harmful to the appellants. That inference by the District Court is necessarily inconsistent with the facts as the Commission viewed them, for section 7(c) of the Administrative Procedure Act specifies that "the proponent of a rule or order shall have the burden of proof." The ICC was the proponent in the investigation proceeding, and Commission counsel even conceded that the Commission had the burden of proving that Kenneth did not have other clients (if that had been the fact) (R. 38).[8] Therefore when the Commission viewed the facts it

even defendants' counsel admitted, "we know there is such a thing as a tariff consultant; some lawyers are called tariff consultants." (R. 31) A tariff consultant is understood in the industry to be an independent professional who holds himself out as an expert on the rates which are to be charged, auditing freight bills of shipper-clients in search of overcharges which may be recovered and advising carrier-clients what rates should be charged.

[8] A similarly erroneous inference based upon the District Court's misapprehension as to the burden of proof is evident in the "syllabus"

must have drawn the opposite inference—that facts not shown were consistent with the innocence of the appellants.

Fifth, the "syllabus" finds in a few words of ambiguous testimony which obviously were discredited by the Commission[9] evidence that "some of the services" of Kenneth as a free lance tariff consultant for his client Nelson Co. "were performed after Kenneth's acquisition of the stock of Gilbertville Co. (Tr. 427), that is, after March 2, 1953." And that finding, together with the erroneous findings discussed as "Fourth" hereinbefore and another manifestation of the District Court's erroneous view of the burden of proof, forms the basis of the District Court's conclusion that section 5(4) was violated: "the whole convergence begins with the purchase of shares in a second company made by an individual at a moment when he is not shown to have severed a relationship to the arterial traffic nerve of the first company." (196 F. Supp. at 360) Yet the Commission

finding that "[s]ome items of expense are shared upon a set formula, not shown to be other than arbitrary." Although the word "some" is puzzling, "Some items of expense" apparently refers to the expense of leased telephone lines connecting those terminals in which both Nelson Co. and Gilbertville Co. are quartered, for the Commission's Report refers to no other "shared" expense. There was not any evidence, or even any suggestion, that the apportionment was disproportionate, and the ICC clearly would have had the burden of proving the apportionment questionable.

[9] The Commission's refusal to credit these few words was obviously correct: That the witness was only making a guess appears from the words "must have been" in the very statement the District Court relies upon and also from the witness' admitted lack of knowledge and confusion about the subject. (Pl. Ex. A Tr. 423-27; R. 2, 60) Moreover, his guess was based solely upon data concerning Kenneth's annual income (*id.* at Tr. 272-77), which, as Commission counsel conceded to the District Court (R. 34), do not justify any inference as to when work is performed. Because Kenneth was an independent professional, the time he received his fees depended upon when he rendered statements, not upon when he rendered services. It is significant that, whereas Kenneth was a free lance tariff consultant for four months in 1951, he received no fees in 1951.

expressly found that Kenneth was a free-lance tariff consultant only until "March 1, 1953"—that his career as a free lance tariff consultant stopped short of, and did not overlap, any connection with Gilbertville Co. (80 M.C.C. at 263). Even without regard to its misapprehension as to where the burden of "showing" lay, the District Court's action in holding that a crucial fact which was expressly found by the Commission was "not shown" but nevertheless affirming the Commission's decision is unmistakable evidence that the District Court usurped the Commission's function.

(b) The District Court correctly held that the Commission's findings in its Report included some matters which were "trivial to the point of demonstrable irrelevance" and "some innocent conduct, or conduct of ambiguous nature." (196 F. Supp. at 359-60). And the Commission expressly relied upon "all the facts of record" (80 M.C.C. 264), without indicating what weight it had attached to those matters which the District Court realized were "trivial", irrelevant, "innocent" and "ambiguous" except that the Commission's singling out such matters for special attention in its Report suggests that the Commission deemed them significant. The District Court was therefore required to remand the case to the Commission for reconsideration and decision without taking into account the matters which the District Court rejected as "trivial", irrelevant, "innocent" or "ambiguous". *See Communist Party* v. *Subversive Activity Control Board*, 351 U.S. 115; *Carey* v. *Civil Aeronautics Board*, 275 F.2d 518, 522 (C.A. 1, 1960); cf. *Colorado Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 634. In refusing to do so because it thought that "excision" or "deletion" of those matters would not change the Commission's ultimate conclusion, the District Court again usurped the Commission's functions and acted

squarely contrary to the admonition by this Court in the *Chenery* case that "a judicial judgment cannot be made to do service for an administrative judgment." (318 U.S. at 88)

2. The finding of ultimate fact and the legal theory upon which the District Court based its decision of the issue arising under section 5(4) were entirely different from those relied upon by the Commission. In the words of the *Chenery* case, the Report of the Commission in the present case plainly "discloses that its action [in finding a violation of section 5(4)] was based" upon the conclusive presumptions of sections 5(5) and 5(6): the Commission's conclusion after its lengthy factual recitation was that "we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson [Co.] within the meaning of section 5(6) at the time he purchased the stock of Gilbertville [Co.], and that the conclusive presumption of section 5(5) applies"; (80 M.C.C. at 264) The District Court's opinion just as plainly discloses that the District Court did not judge the validity of the Commission's decision upon those grounds: the District Court specifically disclaimed reliance upon the grounds the Commission had used by stating, at the end of its discussion of the issue arising under section 5(4), "The foregoing reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (196 F. Supp. at 360)

The difference between the rationale of the District Court and the rationale of the Commission is fundamental. The conclusive presumptions of sections 5(5) and 5(6) were enacted to describe situations not otherwise comprehended by section 5(4). See, e.g., *Hearings on H.R. 9059 Before House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. (1932) at 32-34; S. Rep. No. 87, 73d Cong., 1st Sess.

(1933) at 9-10. The District Court's ground of decision required it to make a finding of ultimate fact that control or management in a common interest had been effectuated, but the Commission's decision, using the conclusive presumptions of sections 5(5) and 5(6), involved a much different ultimate fact. To support its "opinion . . . that Kenneth Nelson was affiliated with Nelson [Co.] within the meaning of section 5(6) at the time he purchased the stock of Gilbertville" Co., the Commission must tacitly have found that as of that time there existed a certain "relationship" of Kenneth to Nelson Co. a "relationship" as a result of which it would have been "reasonable to believe" that the affairs of any carrier of which Kenneth acquired control would be managed in the interest of Nelson Co. Because the District Court decided the case upon a different ground instead of reviewing the Commission in accordance with the principle of the *Chenery* case, that crucial finding of ultimate fact—that such a "relationship" then existed has not yet been subjected to judicial review even though it was the keystone of the Commission's decision.

The District Court's *de novo* review is peculiarly repugnant to an orderly administrative process in the present case, for the result has been that the District Court has affirmed the Commission on a ground that the Commission itself had impliedly rejected. Division 4 decided the present case on essentially the same theory as that used by the District Court (although, as has been demonstrated, on different facts). On reconsideration, however, the Commission abandoned that ground and invoked instead the conclusive presumptions of sections 5(5) and 5(6). Thus the District Court's "affirmance" of the Commission is truly a usurpation, for it is upon a ground upon which the Commission itself was unwilling to decide the case.

B. *The Commission's decision contained neither findings nor reasoning adequate to satisfy the requirements established by Congress and this Court.*

The Commission's Report falls disgracefully short of the minimum standards of explication of its decision established by Congress and innumerable decisions of this Court. "There can be no doubt that the Administrative Procedure Act applies to proceedings before the Commission". *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 192. Section 8(b) of the Administrative Procedure Act requires all decisions to "include a statement of (1) *findings and conclusions*, as well as the *reasons or basis* therefor, upon all the material issues of fact, law or discretion presented on the record". (Emphasis added.) The Commission must at least tell the reviewing courts and the parties how or why and because of what basic facts it reached its conclusion. See *Beaumont, Sour Lake & Western Ry. Co.* v. *United States*, 282 U.S. 74, 86 (1930); cf. *Eastern Central Motor Carriers Association* v. *United States*, 321 U.S. 194, 212. "For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong". *United States* v. *Chicago, M. St. P. & R. R. R.*, 294 U.S. 499, 511. The "reviewing court cannot perform its proper function when the regulatory body has failed to make adequate exposition of the grounds for its action." *South Carolina Generating Co.* v. *Federal Power Commission*, 249 F.2d 755, 764 (C.A. 4, 1957), cert. denied, 356 U.S. 912.

The Commission's Report completely fails to articulate how or why the Commission resolved as it did three primary and fundamental issues in the present case. (1) The Report

does reveal that the Commission determined a violation of section 5(4), by means of the conclusive presumptions of sections 5(6) and 5(6), but it does not indicate what basic facts were found to prove the "relationship", which, as has been noted, is the ultimate fact which must be found to invoke those conclusive presumptions. (2) That a section 5(4) violation be continuing is prerequisite to the remedial jurisdiction of the Commission pursuant to section 5(7), and the Report contains no adequate finding of such a continuing violation. (3) For the Commission to order any remedy which it has not found "necessary" is unauthorized by section 5(7) and also forbidden by many decisions of this Court. Yet the Commission has ordered Kenneth to sell the stock of Gilbertville Co. without any indication why divestiture is necessary or even that the Commission ever considered that question—indeed, without any explanation whatever of the divestiture order.

1. The Commission's Report contains only one clue to the reasoning underlying the Commission's decision that section 5(4) was violated, to wit, the ultimate finding "that Kenneth Nelson was affiliated with Nelson [Co.] within the meaning of section 5(6)". (80 M.C.C. at 264) Perhaps from that finding the parties and the courts may infer that somehow the Commission found as an ultimate fact the critical "relationship" which section 5(6) would make the basis of a conclusive presumption of such affiliation—a "relationship" between Kenneth and Nelson Co., existing at the time Kenneth purchased the stock of Gilbertville Co., as a result of which it would have been "reasonable to believe" that the affairs of any carrier of which Kenneth acquired control would be managed in the interest of Nelson Co.

But the basic facts necessary to support an ultimate finding of such a "relationship" may not be inferred. *New York Central R. Co.* v. *United States*, 99 F. Supp. 394, 401 (D. Mass. 1951), affirmed, 342 U.S. 890. Nor can those facts

be found in the Commission's Report. Although almost two printed pages of the Report (80 M.C.C. at 263-64) are devoted to recitation of a motley collection of facts, nowhere in the Report is there any indication of what basic fact or facts (if any) on those two printed pages the Commission thought proved the requisite "relationship". Certainly no relevant "relationship" is recited there. To the contrary, express findings of fact in those two printed pages show that the only two kinds of possible "relationship" which had ever existed had ended before Kenneth even signed the contract to buy the stock of Gilbertville Co. on March 2, 1953: Kenneth "resigned from the business" of Nelson Co. and sold his stock in September 1951, and the connection between Kenneth as a free lance tariff consultant and Nelson Co. as a client of his ended on or before March 1, 1953. (80 M.C.C. at 263; see Pl. Ex. A, Tr. 33-38, R. 2, 60; see also pp. 18-19, *supra*)

The essential principle violated by the Commission in the present case was stated succinctly ten years ago by Chief Judge Magruder, speaking for the very court from which the present appeal has been taken, in *New York Central R. Co.* v. *United States*, *supra* at 401, a decision which this Court affirmed:

> "[A]n ultimate finding is not enough in the absence of a basic finding to support it . . . And these basic findings should be clearly stated and identified as such, so that the reviewing court will not be groping in the dark as to the grounds for the Commission's ultimate conclusion."

Moreover, even "groping in the dark" is fruitless (and somewhat frightening) in the present case. One of the facts which appears in those two printed pages is that Kenneth is a brother and half-brother, respectively, of the three

owners of Nelson Co." Has the Commission laid down a rule of law that a brother of the owners of a carrier is *ipso facto* "affiliated" with that carrier? If so, the appellants and the reviewing courts are entitled to know it. It is obvious (and the District Court held (196 F. Supp. at 359 66) that those two printed pages include facts which are "trivial to the point of demonstrable irrelevance", "innocent" and "ambiguous". Were any of these facts the basis of the finding that "Kenneth Nelson was affiliated"? If so, the parties and the reviewing courts are entitled to know it. Indeed, inasmuch as the Commission based its ultimate finding that "Kenneth Nelson was affiliated" upon "all the facts of record", not only upon the facts stated in the Report, there cannot even be any certainty that the crucial facts are to be found anywhere upon those two printed pages.

The Commission's decision that Kenneth was affiliated with Nelson Co. within the meaning of section 5(6) is therefore unreviewable.

> "These findings are far too vague and scanty to explain what facts the ICC found, what legal conclusions it drew from these facts, and why. *There is no sufficient bridge between the narrative statement of facts and the ultimate determination* of no undue prejudice. This Court can have no way of reviewing the administrative conclusions. *We do not know how the facts were appraised or how the various factors were weighed and balanced.* We cannot say whether the result was arbitrary or was a proper exercise of administrative judgment." *Stanislaus County* v. *United States*, N.D. Cal. C.A. 7834, decided December 12, 1960.[10]

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[10] Because the opinion in *Stanislaus County* v. *United States* is unreported, appellants will lodge a certified copy of that opinion with the Clerk of this Court when this Jurisdictional Statement is filed.

In the present case the unknown "relationship" is the foundation of all the Commission's reasoning, which appears to have been essentially as follows: "relationship" exists, therefore section 5(6) applies; because section 5(6) applies section 5(5) applies; because section 5(5) applies section 5(4) was violated; because section 5(4) was violated section 5(2) application is denied *and* divestiture is ordered. Therefore the lack of support of the conclusion of "relationship" by the necessary basic findings and reasons impeaches the entire Commission decision. Because the finding of "relationship" the foundation of the stack of presumptions and rules of law—must collapse, the whole stack of presumptions and rules must topple and fall like a stack of children's blocks.

Decisions thus devoid of any reasoning and clearly unreviewable must be set aside, lest they become the breeding grounds for slovenly work and arbitrary results. See, e.g., *New York* v. *United States*, 342 U.S. 882, 884 (Douglas, J., dissenting); *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F.2d 554 (D.C. Cir. 1938), cert. denied, 305 U.S. 613. Yet in the present case the District Court did not set aside the Commission's decision, or even criticize it; instead, the District Court discussed the obligations of "a fact-finder [who] has the talent of Justice Holmes". (196 F. Supp. at 359)[11] However, neither that discussion nor the District Court's reference to some

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[11] The reference to Mr. Justice Holmes is only pertinent if the District Court meant to imply that the Commission has "the talent of Justice Holmes". Yet such an implication is incredible in light of the Commission's work in the present case and the opinions of other authorities as to the calibre of the ICC's work. See, e.g., *Inland Motor Freight* v. *United States*, 60 F. Supp. 520, 525 (E.D. Wash. 1945), where the court observed that "the Commission's reluctance to make definite and detailed findings is strikingly apparent in this case." And in his recent "Report on Regulatory Agencies to the President-Elect,"

supposed danger of causing "agency heads, judges, and others . . to delegate more than they now do to anonymous law clerks" (196 F. Supp. at 359) is even colorable justification of the disregard of the Administrative Procedure Act and the decisions of this Court shown by the Commission in failing to articulate what "relationship" it found to exist and by the District Court in refusing to set aside the Commission's decision because of that failure.[12]

2. In ordering the respondents to do various things and, in particular, ordering Kalmanash to dispose of the stock of Gilbertville Co., the Commission purported to act pursuant to section 5(7) of the Interstate Commerce Act. Section 5(7) grants to the Commission in certain circumstances a limited power to remedy violations of section 5(4):

> "If the Commission *finds* after such investigation that such person *is violating* the provisions of such paragraph [section 5(4)], it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, *to prevent continuance* of such violation." (Emphasis added.)

James M. Landis stated (p. 39): "Opinions of the Interstate Commerce Commission are presently in the poorest category of all administrative agency opinions. Their source is unknown and the practice has grown up of parsimony in discussing the applicable law in making a determination. Lengthy recitals of the contentions of the various parties are made as a prelude to a succinct conclusion devoid of any real rationalization."

[12] The District Court also cited *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94. In that case, however, this Court excused the Commission from its duty to make clear basic findings of fact and statements of reasons only as to certain irrelevant contentions of an intervenor—"contentions that are so collateral or immaterial that the law did not require specific findings upon them." (361 U.S. at 193.) The "relationship" involved in the present case—upon which an assertion of violation of section 5(4), a denial of a section 5(2) application and a decree of divestiture are all based—can hardly be called either "collateral" or "immaterial".

The language of section 5(7) only authorizes the Commission to prevent further continuance of a continuing violation; it does not permit the Commission to punish, redress, or otherwise remedy a violation which is *fait accompli*. In other words, whereas section 5(4) forbids both effectuation and maintenance of control or management in a common interest, Congress drew a distinction, particularly for remedial purposes, between the effectuation of such control or management (necessarily a single act or series of acts) and maintenance or continuance of such control or management after it has been effectuated, see H.R. Rep. No. 193, 73d Cong., 1st Sess. (1933) at 16, 17, and restricted the Commission's remedial power pursuant to section 5(7) to termination of continuing violations of the latter type. See S. Rep. No. 87, 73d Cong., 1st Sess. (1933) at 9, 10.

It cannot be doubted that section 5(7) thus raises a material issue of fact within the meaning of section 8(b) of the Administrative Procedure Act—whether the violation is continuing—and therefore section 8(b) requires "findings and conclusions, as well as the reasons or basis therefor," upon that issue. But in the present case there is no adequate finding that any violation is continuing.

Sections 5(5) and 5(6) of the Interstate Commerce Act, upon which the Commission based its decision, provide for conclusive presumptions only of effectuation of control or management in a common interest and not of maintenance or continuation of such control or management. Nor can the assertion of continuance which is part of a formal recitation of section 5(4) violation in the Commission's Report (80 M.C.C. at 266) satisfy the requirement for findings. *Florida* v. *United States*, 282 U.S. 194, 213; *Atlanta & Saint Andrews Bay Ry. Co.* v. *United States*, 104 F. Supp. 193 (M.D. Ala. 1952). The only other reference to continuance is found in the conclusion "we affirm the find-

ings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing" (80 M.C.C. at 264-65). Seeking then for the affirmed "findings", the only explicit statement that may be found in Division 4's Prior Report is "[w]e concur in the examiner's conclusion that Nelson and Gilbertville are controlled or managed in a common interest" (75 M.C.C. at 53) and the relevant statement in the Examiner's Report is that "control and management in a . . . common interest . . . *presumably* are being maintained" (p. A-69, *infra*; accord, p. A-63, *infra*) (Emphasis added.) In other words, the Examiner was unable to find, on the basis of evidence pertaining to the years 1953 through 1955 which he heard in 1956, that such control and management were being maintained even in 1956.

Thus the Commission's Report does not contain even an adequate conclusion of a continuing violation, much less the basic findings adequate to support such a conclusion. The Commission's claims to have considered "the evidence" and "all the facts of record" are not sufficient substitutes for the required findings. *Beaumont, Sour Lake & Western Ry. Co. v. United States*, 282 U.S. 74, 86; *Atlanta & Saint Andrews Bay Ry Co. v. United States*, 104 F. Supp. 193 (M.D. Ala. 1952). Nor will the missing findings be supplied by the courts.

> "This Court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida v. United States*, 282 U.S. 194. Recently this

court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication." *Atchison, Topeka & Sante Fe Ry. Co. v. United States*, 295 U.S. 193, 201-02; see also *Inland Motor Freight v. United States*, 60 F. Supp. 520, 524 (E.D. Wash. 1945).

Due to the absence of these required findings, the Commission had no jurisdiction pursuant to section 5(7) to issue any remedial order.

3. Section 5(7) of the Interstate Commerce Act only authorizes the Commission to order "such action as may be *necessary*, in the opinion of the Commission, to prevent continuance of such violation." Thus section 5(7) presents another material issue of fact, law or discretion within the meaning of section 8(b) of the Administrative Procedure Act—whether the divestiture which was ordered was necessary to prevent continuance of such violation—and the Commission was required by section 8(b) to state its "findings and conclusions, as well as the reasons or basis therefor" upon that issue of necessity. But the Commission gave no indication as to why divestiture may have been thought necessary or even why it was ordered. There is not even any indication that the Commission ever considered whether the divestiture ordered was necessary.

The Commission's failure to articulate its reasons for ordering Kenneth to dispose of the stock of Gilbertville Co. is contrary to numerous decisions of this Court. For example, in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, this Court insisted that the Board demonstrate that it had exercised its discretion and explain why it had ordered the remedy it did. And in *Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, this Court refused to sustain a cease-and-desist order because "we are left in the dark whether some [less drastic remedy] . . .

would in the judgment of the Commission be adequate." (327 U.S. at 613) See also *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426.

This Court has insisted upon a showing and findings of necessity as a prerequisite to a divestiture order even in antitrust cases. *Hughes* v. *United States*, 342 U.S. 353. In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 602-603, the majority of the Court held:

> "Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available. That judicial restraint should follow such lines is exemplified by our recent rulings in *United States* v. *National Lead Co.*, 332 U.S. 319, where we approved divestiture of some properties belonging to the conspirators and denied it as to others, pp. 348-353. While the decree here does not call for confiscation, it does call for divestiture. I think that requirement is unnecessary."

See also *United States* v. *General Electric Co.*, 115 F. Supp. 835, 871 (D.N.J. 1953).

The principle that divestiture not be ordered unless and until it has been found necessary is particularly important in the context of the Interstate Commerce Act, not only because the Commission's power pursuant to section 5(2) is expressly limited, but also because of the ambivalence peculiar to the national transportation policy. The Congressional purpose underlying the whole of section 5 of the Interstate Commerce Act is to promote merger and consolidation, not divestiture and dispersal, in the national

transportation system. See *County of Marin v. United States*, 356 U.S. 412, 416-18. That policy and the abiding Congressional concern about divestiture orders revealed by the legislative history of the Interstate Commerce Act[13] require that the drastic remedy of divestiture be used most sparingly.

The District Court's attempt to justify the divestiture order and to excuse the Commission's failure to make the required finding as to necessity was a ruling that as a matter of law in any case involving an unlawful acquisition of control a divestiture order may be entered without regard to other circumstances:

> "Indeed, when the I.C.C. has found that an offender has unlawfully acquired control of a carrier and continues to hold the acquisition, an order of divestiture has a fitness so perfect that the order not merely is obviously a suitable exercise of discretion, but needs no gloss.
>
> ". . . . [N]o tribunal is called on to write an essay . . . ." (196 F. Supp. at 361, 362)

In that one bold stroke, the District Court swept aside the requirements of the Administrative Procedure Act, the Interstate Commerce Act and the decisions of this Court.

[13] In 1932 it was proposed that the ICC be given power to order divestiture when control of a carrier was held without consent of the Commission if (and only if) that control tended to defeat the national consolidation plan, see *Hearings on H.R. 9059 Before House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. (1932) at 19, 36, but even that very limited provision was weakened so as merely to provide for divestment of voting power, see H.R. Rep. No. 193, 73rd Cong., 1st Sess. (1933) at 23, 24. The weakened provision was then deleted from the Interstate Commerce Act in 1940 because it had been necessary only to protect the nationwide plan of consolidation administered by the Commission and it became unnecessary when the concept of such a plan was abandoned. See H.R. Rep. No. 1217, 76th Cong., 1st Sess. (1939) at 28.

The District Court sought support for its action in the recent decision of this Court in *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316. But the *duPont* decision does not justify an absolute rule of divestiture without regard for necessity, even in the context of the Clayton Act; in *duPont* this Court ruled only that divestiture should be imposed "if the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief". (366 U.S. at 327) This Court recognized that "hardship can influence choice . . . among two or more effective remedies", not only by saying so, but also by considering at great length the very question the Commission ignored in the present case—whether complete divestiture was necessary. (366 U.S. at 331-34)

No necessity for divestiture is apparent from the record in the present case. Section 5(4) was violated, according to the Commission, because Kenneth is presumed, pursuant to section 5(6), to have been affiliated with Nelson Co. when he purchased Gilbertville Co. There is no possible reason why severance of Kenneth's connections with either carrier would not be a fully effective remedy. Thus it would have been entirely sufficient "to prevent continuance of such violation", to order Kenneth and Nelson Co. to terminate whatever "relationship" the Commission found to exist and or to enjoin control or management in a common interest (as both Division 4's order and one paragraph of the Commission's order actually did). Cf., *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 400-01 (S.D.N.Y. 1957), affirmed 259 F.2d 524 (C.A. 2, 1958). Such an alternative remedy would avoid the harsh results of a divestiture order, which are apparent on the record, such as requiring Kenneth to sell, almost inevitably at a "fire sale" price, all of the stock of the corporation in which he has invested eight and a

half years of his life and large amounts of money and whose business, as the District Court found, has "flourished under . . . [his] direction and ownership". (196 F. Supp. at 356)

Moreover, pursuant to the express language of section 5(7), rationalization of the ordered divestiture as "necessary", if it can be so rationalized, was for the Commission, not for the District Court. *Florida* v. *United States*, 282 U.S. 194, 215 (1931). The District Court erred in failing to remand the case to the Commission for a "clear indication that it has exercised the discretion with which Congress has empowered it" ", *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94, quoting *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, and that it "has given consideration to all of the criteria which Congress has required to be taken into account in determining the question before it", *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819, 826 (S.D.N.Y. 1958); see *Salzberg* v. *United States*, 176 F. Supp. 867 (S.D.N.Y. 1959); *Cuttlagate Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953); *Matter of United Corp.*, 249 F. 2d 168, 179-81 (C.A. 3, 1957).

C. The Commission's denial of the merger application was based solely upon two erroneous rules of law created by the Commission in the present case.

In section 5(2)(c) of the Interstate Commerce Act, Congress directed the Commission, "in passing upon any proposed transaction under the provisions of" section 5(2), to "give weight to . . . [certain] considerations, among others". The Commission, by its decisions, has added to the criteria prescribed in section 5(2)(c), another consideration, usually called "fitness" of the applicants. Under the aegis of its "fitness" criterion, the Commission has

frequently taken willful violations of law into account when considering section 5(2) applications and has sometimes denied such applications because lack of "fitness" demonstrated by such violations was not outweighed by the potential benefit of the merger to the public interest and other like factors. Although no Commission denial of a section 5(2) application based on such "unfitness" has ever been sustained by the courts, appellants do not question (and they assume for purposes of argument) that the Commission may properly consider a willful violation of law as one factor "among others" bearing on whether a section 5(2) application should be granted.

In considering the proposed merger of Gilbertville Co. and Nelson Co., the Examiner applied the criteria set forth in section 5(2)(c) as well as the Commission-created "fitness" criterion. He found that the proposed merger would be in the public interest and would result in a sounder common carrier and achieve substantial savings without adverse effects upon employees or competition, that the applicants were not "unfit" because section 5(4) had been violated, and that the section 5(2) application should be granted. (pp. A-72, A-79, *infra*) The Commission never questioned the correctness of the Examiner's findings concerning the criteria of section 5(2)(c); it never even considered those criteria. Instead, the Commission denied the section 5(2) application on the sole ground that section 5(4) had been held violated.

In denying the section 5(2) applications in the present case, the Commission made two new and clearly erroneous rules of law: it said that "unfitness" comprised of a violation of law requires denial of a section 5(2) application, regardless of whether or not the proposed merger is otherwise in the public interest; and it held, *sub silentio*, that any violation of law, however innocent, equals such "unfitness".

1. Until it decided the present case the Commission had consistently treated its "fitness" criterion as merely one factor to be weighed together with the public interest and the other factors specified by section 5(2)(c) in considering a section 5(2) application. As the Commission's Report stated, "the views *heretofore* followed, [were] that law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented." (80 M.C.C. at 265) (Emphasis added.) Section 5(2) applications have been granted by the Commission despite blatant violations of law, e.g., *Otto L. Hankison-Control-Mutual Trucking Co.*, 37 M.C.C. 617 (1941), and such approvals have been affirmed by the courts, e.g., *Baltimore Transfer Co. v. Interstate Commerce Commission*, 114 F. Supp. 558 (D. Md. 1953), affirmed, 346 U.S. 890. Thus the Examiner's determination that the proposed merger of Gilbertville Co. and Nelson Co. should be approved was based upon a weighing of the section 5(4) violation he had found and the other criteria. But the Commission renounced this weighing process and made its "unfitness" criterion exclusive.[18] "Now," says the Commission (by adopting the words of Division 4), "after more than 20 years of regulatory experience," "paramount public interest" can no longer warrant granting a section 5(2) application when a "law violation" has been found; now the controlling principles, instead of public interest, are "that a violation of law should not be rewarded and that existing carriers endeavoring faithfully to comply with the law should be encouraged and protected." (80 M.C.C. at 266)

The District Court simply ratified the Commission's action:

[18] The weighing process was renounced over the protests of one Commissioner who concurred only in the result and at least the two dissenters who expressed their opinions. (80 M.C.C. at 266-67)

"Under some imaginable circumstances, to have granted the merger application might conceivably be in the public interest. But to deny the application to formalize and strengthen a relationship already in part achieved by unlawful conduct is a clearly proper exercise of a delegated discretionary authority." (196 F. Supp. at 382).

Yet what the Commission did in the present case was to disregard, apparently on grounds of obsolescence "after 20 years", both the mandatory criteria of section 5(2)(c) and the national transportation policy. In section 5(2)(c) Congress specified that "the Commission shall give weight to" four listed considerations; undoubtedly the Commission is entitled to consider its "manifold experience" but it is required also to consider the criteria Congress deemed important. Moreover, the national transportation policy of merger and consolidation which Congress included in the whole of section 5 of the Interstate Commerce Act is pertinent. *Upshaw et Main v. United States*, 356 U.S. 412, 416. It is defeated by the Commission's view that no merger, however much in the public interest, will receive section 5(2) approval if there has been a violation of law.

The Commission had no "delegated discretionary authority" to disregard section 5(2)(c) and the national transportation policy. Rules adopted by the Commission must be "consistent with the statutory standards which govern its action". *Eastern Central Motor Carriers Association v. United States*, 321 U.S. 194, 211. If section 5(2)(c) and the national transportation policy are obsolete it is for Congress to change them. The Commission did not even exercise the discretion it was given to "give weight to" all relevant considerations in "passing upon" section 5(2) applications. It renounced that discretion when it announced that "a showing of law violation" conclusive-

ly bars granting of a section 5(2) application. By ignoring the mandatory criteria of section 5(2)(c) and the interests of the national transportation policy and concentrating on a single criterion, the Commission clearly erred. See, e.g., *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86; *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953).

2. Prior to the decision in the present case, "fitness" of applicants was a question of fact involving considerations of good faith and moral character. See, e.g., *Ethel B. Frick Contrai-Royal Blue Coaches, Inc.*, 56 M.C.C. 617 (1950). Applicants were not unfit to merge pursuant to section 5(2) because they had innocently violated section 5(4). E.g., *Master Transportation, Inc.-Merger-Master Trucking Co., Inc.*, 70 M.C.C. 421 (1957). But "unfitness" could not have been found as a fact in the present case; it appears to have been conclusively presumed.

The Commission made no finding of "unfitness" as a fact. Nor does the administrative record contain any substantial evidence of "unfitness". The record does contain, however, an express finding of the Examiner, who personally observed the applicants both in the hearing room generally and particularly on the witness stand, that the applicants are not "unfit", which finding is entitled to great respect. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 496; *Matter of United Corp.*, 249 F.2d 168 (C.A. 3, 1957).

In affirming the Commission's decision the District Court said, "Here the I.C.C. did no more than to refuse lawful unification to companies which it had found had precipitately and perilously effectuated a prohibited union without permission." (196 F. Supp. at 362). If that were so — if the Commission had found effectuation of control and management in a common interest as a matter of fact — the case might be different. But instead the Commission

held section 5(4) violated because "the conclusive presumption of section 5(5) applies" (80 M.C.C. at 266); and "the conclusive presumption of section 5(6)" became applicable because Kenneth was conclusively presumed to be "affiliated with" Nelson Co. pursuant to section 5(6), which in turn means only that the Commission could find it reasonable to believe certain facts. That it was reasonable for the Commission to believe certain facts does not imply any culpable or immoral conduct on the part of Nelson Co. or Gilbertville Co. or anyone else; it does not even imply that control or management in a common interest in fact existed at any time. In other words, sections 5(4) and 5(6) express only a Congressional determination that certain situations which are not otherwise unlawful involve a sufficient *risk* of control or management in a common interest that, even though such control or management does not exist, section 5(4) will be conclusively presumed to be violated. But Congress did not suggest that persons involved in situations comprehended by sections 5(4) and 5(6) are "unfit" for a merger pursuant to section 5(2).

The Commission's Report indicates that the Commission conclusively presumed "unfitness" from "a showing of law violation" (80 M.C.C. at 266). But, inasmuch as the "law violation" found in the present case, even if correctly found, means no more than that it is reasonable for the Commission to believe certain things, "unfitness" cannot rationally be inferred or presumed from the mere fact of "law violation".[15] See, e.g., *Petition of Kreahl*, 122

[15] Under the provisions of the Federal Aviation Act of 1958, sections 408 and 409, 49 U.S.C. §§ 1378 and 1379, which are closely parallel to sections 5(2) and 5(4) of the Interstate Commerce Act, the Civil Aeronautics Board has placed importance upon the effectuation of unauthorized control in violation of the acts, but it has carefully avoided equating such violations with automatic disqualification. See *Charles C. Sherman*, 15 C.A.B. 876 (1952); *cf. Atlas Corporation*, 21 C.A.B. 425 (1955).

F. Supp. 322 (S.D.N.Y. 1954) (naturalization examiner erred in finding lack of "good moral character" on basis of criminal conviction without considering contents of indictment, plea, verdict and sentence). This Court has long held that the legislature may not create presumptions without a rational basis. See, e.g., *Tot* v. *United States*, 319 U.S. 463. *A fortiori* an administrative agency must exercise its much more limited discretion in a rational manner. See, e.g., *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-53; *Colorado Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 634; cf. *Sherbert* v. *Board of Higher Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183.

D. *The District Court did not and could not find the Commission's decisions or its findings supported by substantial evidence.*

The District Court held "that the statements of the I.C.C. are supported by evidence" (196 F. Supp. at 359), but it failed to find either the Commission's findings or its decision supported by "substantial evidence" on "the whole record" (Administrative Procedure Act, section 10(e)). That error was one of substance, not merely of semantics,[16] for plainly the Commission's decision was not supported by substantial evidence, nor were a number of its findings.

The distinction between "evidence" and "substantial evidence" is clear: "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488. To be "substantial" the evidence must be "more than a mere scintilla. It

[16] This error is also symptomatic of the District Court's failure to perform its function of judicial review. See pp. 12-21 *supra*.

means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. Accordingly, it 'must do more than create a suspicion of the existence of the fact to be established; . . . *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300.'" (340 U.S. at 477)

That the District Court ignored the distinction between "evidence" and "substantial evidence" appears not only from the phraseology of its holding, "supported by evidence", but also from the lack of any discussion underlying that holding. The District Court casually dismissed appellants' argument that the evidence was not substantial with nothing but a quotation from defendants-appellees' brief of "the essential portion of the text" of the Commission "with the supporting transcript references conveniently supplied by defendants". (196 F. Supp. at 356) It is evident that in copying those transcript references to "evidence" the District Court did not consider the other "evidence", cited by appellants, which (in the words of the *Universal Camera* case) "fairly detracts from its weight."

Most of the facts cited by the Commission in its "narrative statement" are so obviously innocent and irrelevant that no argument is necessary to show that those findings (even together with the evidence which allegedly supports them) cannot sustain the Commission's decision. Moreover, even a summary discussion of the evidence in a case as complicated as the present one seems neither appropriate to the purpose of this statement nor consistent with reasonable brevity. Appellants therefore offer here only a few brief comments upon two of the findings, in order to illustrate that the District Court could not have meant to hold the Commission's findings and decision supported by substantial evidence and that this appeal pre-

sents a substantial question as to whether the findings and decision were thus supported.

1. One of the Commission's findings, "the latter [Gilbertville Co.] constantly and frequently leases from a pool of equipment maintained by Nelson [Co.]", is supposedly supported by the following citations: "Tr., Solomon, 170; Chilberg, 524, 543-46; K. Nelson, 702-13, 819; Shea, 835-37, 844-46, 870; LaCour, 1023, 1029-31". (196 F. Supp. at 358) Substantiality of evidence is not a quantitative test, however; that thirty transcript pages are cited cannot compensate for the fact that the testimony those pages contain does not support the quoted finding.

The cited pages contain, together with much that is wholly irrelevant, testimony tending to prove only the following pertinent facts: During the period from the spring of 1953 to the summer of 1956 Gilbertville Co. from time to time leased vehicles from Nelson Co. if and when Nelson Co. was not using all of its vehicles. The only vehicles (if any) available for Gilbertville Co. to lease on any given day (if it wished to lease) were those (if any) left after Nelson Co. had satisfied all of its needs. The number of vehicles leased on any given day varied from none up to a maximum of six. Also, Gilbertville interchanged with about fifty other carriers; perhaps five per cent of its interchanging was with Nelson Co. But, although interchanging technically involves mutual leases, it is a concept entirely different from leasing. Interchange is an established practice of the trucking industry incidental to interlining of freight between two carriers: the carriers exchange (on a one for one basis) equipment laden with freight to be interlined for comparable equipment either empty or laden with other freight being interlined in the opposite direction. Gilbertville Co. and Nelson Co. used a form of lease in connection with interchange.

On the other hand, evidence *not* cited with respect to the

finding of a "pool of equipment" proves other very relevant facts: When Kenneth purchased the stock of Gilbertville Co. in 1953, it had little equipment (1 truck, 3 tractors and 4 trailers) and a capital deficit, and Gilbertville Co.'s operating revenue for the whole year 1953 was only $75,489. By 1956, its operating revenue had grown to $444,777 in the first seven months, or an average of more than $63,500 per month. Meanwhile, Gilbertville Co. was increasing and upgrading its vehicle inventory as rapidly as possible: by July 31, 1956 Gilbertville Co. had 15 trucks, 12 tractors and 8 trailers, most of which it had purchased new. Gilbertville Co. was buying as many vehicles as it could afford as soon as it could afford them, but it had little capital to invest in equipment during that period of rapid expansion of its business. Leasing of equipment not only was a common industry practice but was permitted by the Commission. At the same time Nelson Co. frequently had much surplus equipment because Nelson Co.'s "particular line of specialized commodities, namely textiles, . . . has a very, very wide fluctuation of usage of equipment." (Pl. Ex. A Tr. 671; R. 2, 60) Indeed, Nelson Co. frequently had twenty tractors and twenty trailers standing idle (although Gilbertville never leased more than six units). (Pl. Ex. A Tr. 70, 236-37, 244-45, 408, 671, 718; Ex. 22, 23; R. 2, 3, 60; see p. A-48, *infra*) It is quite clear that leasing and interchanging equipment was both common in the industry and lawful and proper. See, e.g., *Railway Labor Executives' Association* v. *United States*, 151 F. Supp. 108 (D.D.C. 1957).[17]

Perhaps the cited pages, if read alone, would, in the words of this Court quoted hereinbefore, "create a suspicion of the existence of" a "pool of equipment." But

[17] Indeed, in *Houff Transfer, Inc.* v. *United States*, 105 F. Supp. 851 (D.W. Va. 1952), the *absence* of interchange of equipment was cited as a reason for disapproving a proposed merger.

to be "substantial" the evidence must do more than create such a suspicion. And, again recalling the quoted words of this Court, "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." If the District Court had considered the uncited evidence just referred to, as it should have done but evidently did not do, it could not even have found that the evidence created a suspicion of "a pool of equipment". It would have found merely that Nelson Co. maintained its vehicle inventory, not as a "pool", but for its own business, that Gilbertville Co. and Nelson Co. did business with each other, that part of such business involved interlining by interchanging, and that part of such business involved Gilbertville's supplementing its inadequate vehicle inventory in the only way its limited capital left open to it—leasing equipment which another carrier happened to have standing idle. Those facts constitute substantial evidence of neither "a pool of equipment" nor anything else sinister.

2. The District Court's quotation of the Commission's assertion "each operates to some extent, at least, under managerial direction from officers of the other" is followed by Commission counsel's bracketed citations "Tr., Shea, 847-53, 860-61; LaCour, 1015-16". (Messrs. Shea and LaCour were the ICC investigators to whom this case was assigned.) The testimony to be found in the cited pages is concerned with one day's visit by Messrs. Shea and LaCour to the Ellington, Connecticut terminal where both Nelson Co. and Gilbertville Co. had executive offices. Mr. Shea says that upon entering the terminal building they saw Kenneth "sitting at a desk [1] operating a teletype machine[18] and [2] answering telephone calls and [3] also

[18] Mr. Shea also says that Kenneth tore off, folded up and destroyed some, used teletype tape which had grown "two or three yards" long, and was spilling out of the machine onto the floor. And later that day, no matter how often Mr. Shea demanded to see the tape, Kenneth failed to un-destroy it:

issuing orders over an intercom system to some one." (Pl. Ex. A Tr. 647-48; R. 2, 60) Later it appears that the "some one" was a Mr. Seiferth: "Mr. Kenneth Nelson issued some instructions over the intercom system down to the dock to Mr. Seiferth and instructed him to bring a certain vehicle up to the office. When Mr. Seiferth brought the vehicle up to the office, Mr. Kenneth Nelson then told him to take it back down again." *Id.* at Tr. 852) [9] [4] The

> "A. [Mr. Shea] About thirty minutes later on the same day I asked Mr. Kenneth Nelson to produce the teletype tape that he had taken out of the machine for my inspection and he told me he had destroyed it.
>
> "A. I showed Mr. Nelson a copy of the Commission's rules . . . and again demanded that he produce the teletype records.
>
> "Exam. Baumgartner: After he had told you he destroyed it.
> "The Witness: I again made a demand on him to produce it.
> "Exam. Baumgartner: What did he tell you upon your second demand?
> "The Witness: He said, 'I have destroyed them.'" (Pl. Ex. A Tr. 850-51; R. 2, 60)

The cited testimony of Mr. LaCour simply corroborates the foregoing:

> "A. Mr. Nelson could not or would not produce such records.
> "Exam. Baumgartner: Now which is it, Mr. LaCour, he said would not or could not; there is a big difference.
> "The Witness: He didn't produce the records in response to our request for them." *Id.* at Tr. 1013-16)

[9] Mr. Shea at first appeared to know Mr. Seiferth's job:

> "Q. [Mr. Mueller (JCC counsel)] Did you meet a Mr. Seiferth?
> "A. [Mr. Shea] Yes, I did.
> "Q. Did you ascertain what his job was there?
> "A. He was a dock foreman.
> "Q. A dock foreman in the employ of whom?
> "A. L. Nelson & Sons." (Pl. Ex. A Tr. 852; R. 2, 60)

But on cross-examination, when appellants' counsel asked what Mr. Seiferth's job was, it appeared that Mr. Shea had been guessing:

> "A. [Mr. Shea] He was a dock foreman or he had something to do with the loading dock out at the back of the building, out at the other building, out back.
> "Q. [Miss Kelley (appellants' counsel)] What record did you see as to his job classification?
> "A. I didn't see any records as to his job classification.
> "Q. Did you learn what his duties were in and about the premises?
> "A. Only by observing him, that is all." *Id.* at Tr. 953)

only other thing that Mr. Shea saw was Kenneth "issuing instructions, three times in our presence, to Mrs. Marjorie Edwards, whom we later found was in charge of the L. Nelson & Sons Co. office." (*id.* at Tr. 853)

At the outset, it might be doubted that these statements are substantial evidence of anything. That at one time one man can be operating a teletype machine, speaking over an intercom, and "answering [plural] telephone calls" is inherently incredible. Even putting such questions of credibility aside, Mr. Shea's story is supposed to show that "each operates to some extent, at least, under managerial direction from officers of the other". Yet answering telephone calls and operating a teletype machine are scarcely activities of "managerial direction,"[20] and Mr. Shea raises no doubt that any telephone answering or teletype operating Kenneth (who is an officer of Gilbertville Co.) may have done was done on behalf of Gilbertville Co.[21] Also, the "orders" and "instructions" are obviously not facts, but are merely the conclusions of Investigator Shea, hardly an unbiased witness. Investigator Shea did not repeat the words he characterized as "instructions". Indeed, cross-examination revealed that the testimony was incompetent, for Mr. Shea did not even know what those words were:

[20] It may be, as Mr. Shea's testimony indirectly suggests (see note 18, *supra*), that failing to maintain a file of teletype tapes was a violation of Commission regulations, but that does not make it evidence of "managerial direction from officers of the other". The Examiner found that such violations of regulations as there may have been were "the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not wilfulness" (p. A-72, *infra*), and the Commission's Report made no reference to such violations.

[21] Later on the same day Mr. Shea asked Clifford (who had been away when Messrs. Shea and LaCour arrived) to explain why Kenneth was "directing the operations of the L. Nelson & Sons Company's business." (P! Ex. A Tr. 860; R. 2, 60) Naturally Clifford, in Mr. Shea's words, "could not explain" (*id.* at Tr. 861); Mr. Shea's question was as unanswerable as the legendary "Have you stopped beating your wife yet?"

> "Q. [Miss Kelley (appellants' counsel)] Do you know whether or not that conversation involved interline shipments between Gilbertville and Nelson?
>
> "A. [Mr. Shea] I do not know.
>
> "Q. Am I to understand that you do not know what the conversation was between Kenneth Nelson and Mrs. Edwards?
>
> "A. No, simply she would ask him a question; he would give her an answer." *Id.* at Tr. 954)

Of course, it would be perfectly natural and proper for Gilbertville Co. (represented by Kenneth) to talk to Nelson Co. (represented by Mrs. Edwards), or to ask Mr. Seiferth to bring a truck around for Kenneth to see, in connection with interlined shipments, leases of equipment, or other matters of business between the two carriers.

All of the testimony in the passages cited by the District Court as supporting the assertion that "each [i.e., each of Nelson Co. and Gilbertville Co.] operates to some extent, at least, under managerial direction from officers of the other" has been summarized and or quoted hereinbefore. Half of that assertion (namely, that Gilbertville Co. operates under managerial direction from officers of Nelson Co.) is patently unsupported by the cited testimony, for nothing there even remotely suggests any connection whatever between Gilbertville Co. and any officer of Nelson Co. The other half is equally unsupported when the cited testimony is read together with the cross-examination of Mr. Shea quoted hereinbefore (this page 47 and note 19, *supra*). It cannot be doubted that (in the words of the *Universal Camera* case) the cross-examination "fairly detracts from . . . [the] weight" of Mr. Shea's story; indeed, the cross-examination shows that Mr. Shea testified to no more than his suspicions. Because the District Court failed to consider the cross-examination, it could not have determined

whether the Commission's findings and decision were supported by *substantial* evidence.

Conclusion

The appellants submit that the Commission's decision was based upon novel and erroneous rules of law, which not only have resulted in injustice to the appellants in the present case, but have a general importance to the future administration of the Interstate Commerce Act. Yet, because the District Court disregarded its role, the Commission's decision has not yet been subjected to any judicial review. We believe therefore that the questions presented by this appeal are both substantial and important.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 60-562-S

GILBERTVILLE TRUCKING CO., INC. ET AL.
v.
THE UNITED STATES OF AMERICA,
DEFENDANT,
and
INTERSTATE COMMERCE COMMISSION,
INTERVENING DEFENDANT.

JUDGMENT

WOODBURY, CH.C.J., SWEENEY, CH. J., WYZANSKI, D.J.

After hearing and in accordance with the opinion of the Court, it is

ORDERED action dismissed with prejudice and with costs.

(s) PETER W. WOODBURY
Chief Circuit Judge
(s) GEORGE C. SWEENEY
Chief District Judge
(s) CHARLES E. WYZANSKI, JR.
District Judge

Judgment entered
July 18, 1961

Civil Action 60-562-S

GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. CHILBERG,
CLIFFORD J. O. NELSON, GRETA C. CARLSON,
AND KENNETH A. H. NELSON,
PLAINTIFFS
v.
THE UNITED STATES OF AMERICA,
DEFENDANT,
and
INTERSTATE COMMERCE COMMISSION,
INTERVENING DEFENDANT.

Before WOODBURY, *Chief Judge*, United States Court of Appeals, SWEENEY, *Chief Judge*, United States District Court, and WYZANSKI, United States District Judge

OPINION
July 7, 1961

WYZANSKI, D.J.

Stated briefly, and subject to later amplification, this is a case brought by two motor carriers and four individuals who complain that the I.C.C. has invalidly ordered one of the individuals to divest himself of stock he holds in one of the two carrier companies, and also has invalidly denied the application of one of the two carrier companies to merge into the other carrier company.

The suit in this Court began with a complaint filed August 8, 1960 seeking to enjoin and set aside the following orders of the I.C.C.:

(1) the order of June 9, 1959 entered in No. MC-F-6099, (in the matter of The L. Nelson & Sons Transportation

Co.—Control and Merger—Gilbertville Trucking Co., Inc.), and No. MC-F-6178, (In the matter of The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.), [the said order being set forth in the complaint as "Appendix B"].

(2) the order of February 15, 1960, entered in the same matters, [the said order being set forth in the complaint as "Appendix C"]; and

(3) the order of July 5, 1960, entered in the aforesaid No. MC-F-6099 and No. MC-F-6178, and also in No. MC-42871 (Sub-No. 3) (in the matter of The L. Nelson & Sons Transportation Company), [the said order being set forth in the complaint as "Appendix D"].

Hereafter these will be called orders 1, 2, and 3, respectively.

Jurisdiction to hear the complaint is conferred on this Court by chapters 85, 87, 155, and 157 of the Judicial Code, 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325.

Administratively, this case began when on October 6, 1955, pursuant to §5(2) of the Interstate Commerce Act, 49 U.S.C. §5(2), The L. Nelson & Sons Transportation Company, (hereafter called Nelson Co.), and Gilbertville Trucking Co., Inc. (hereafter called Gilbertville Co.) filed with the I.C.C. an application to merge the operating rights and properties of Nelson Co. as transferee and Gilbertville Co. as transferor. This is the matter to which the I.C.C. gave the number MC-F-6099. The governing Section, 5(2), provides as follows, as far as pertinent:

> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties

theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . .''

''(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this

paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

"(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Other relevant sections meriting citation here are 5(4), 5(5) and 5(6), which read as follows:

"5, par. (4): Control effected by other than prescribed methods. It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers,

however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words 'control or management' shall be construed to include the power to exercise control or management. Feb. 4, 1887, c. 104, Pt. I, §5, 24 Stat. 380; June 16, 1933, c. 91, Title II, §202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, §7, 54, Stat. 905."

"§5, par. (5). Transactions deemed to effectuate control or management. For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting togther, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons, affiliated with any one of them and persons affiliated with any such affiliated

carrier, taken together, in control of another carrier. Feb. 4, 1887, c. 104, Pt. I, §5, 24 Stat. 380; June 16, 1933, c. 91, Title II, §202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, §7, 54 Stat. 905."

"5, par. (6). Affiliation with a carrier denied [sic]. For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier. Feb. 4, 1887, c. 104, Pt. I, §5, 24 Stat. 380; June 16, 1933, c. 91, Title II, §202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, §7, 54 Stat. 905."

December 20, 1955, pursuant to §5(7) of the Act, 49 U.S.C. §5(7), the I.C.C., reciting that it appeared that control or management of Gilbertville Co. in a common interest with Nelson Co. may have been effectuated and may be continuing in violation of §5(4) of the Act, 49 U.S.C. §5(4), ordered an investigation on the Commission's own motion. This is the matter to which the I.C.C. gave the number MC-F-6178. The relevant statutory section, §5(7) reads as follows:

"Investigation by Commission of effectuation of control by nonprescribed methods. The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section.

If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person. Feb. 4, 1887, c. 104, Pt. 1, §5, 24 Stat. 380; June 16, 1933, c. 91, Title II, §202, 48 Stat. 217; Aug. 9, 1935, c. 498, §1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, §7, 54 Stat. 905."

December 20, 1955, the I.C.C. assigned both matters for concurrent hearing on a joint record.

August 16, 1955 the I.C.C. referred these matters to Examiner Baumgartner for hearing on September 17, 1956. September 17 through September 26, 1956, Examiner Baumgartner held the hearing. He served his report June 8, 1957. July 8, 1957 the applicants filed exceptions to the report. The exceptions being disallowed, the I.C.C., by Division 4, on February 26, 1958 entered a report and an order reciting that "Gilbertville [Co.] or Nelson [Co.] have on various occasions violated the provisions of Section 206 and certain regulations promulgated under Part II of the Act", and that "Nelson [Co.] and Gilbertville [Co.] are controlled or managed in a common interest in violation of Section 5(4)", and ordering that Nelson Co. and Gilbertville Co. and four individuals, Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson cease violations of §5(4) of the Act, and denying the companies' application to merge.

April 1, 1958 the applicants filed with the I.C.C. a petition for reconsideration of, and to set aside, the February 26, 1958 order of the Commission by Division 4.

October 2, 1958, Division 4 re-opened the proceedings.

June 9, 1959 the full Commission entered a report and order. The full Commission recited that it had recalled the proceedings from Division 4 for consideration and determination. Simultaneously the I.C.C. found that Kenneth Nelson had acquired control of Gilbertville Co. about March 2, 1953 in violation of (5(4) of the Act, and pursuant to the alleged authority of (5(7) of the Act, ordered him to divest himself of his stock interest in Gilbertville. This is Order 1 under review in this Court.

August 17, 1959 both companies filed with the I.C.C. a petition for reconsideration. February 15, 1960 the I.C.C. denied the petition and made effective the earlier order of June 9, 1959. This February 15, 1960 denial and order constitute Order 2 under review in this Court.

March 7, 1960 Nelson Co. petitioned the I.C.C. for cancellation of all its outstanding certificates of convenience and necessity, coincident with the vacation of the I.C.C. orders of June 9, 1959 and February 15, 1960. March 11, 1960 the I.C.C. temporarily stayed the effectiveness of its orders of June 9, 1959 and February 15, 1960. Then July 5, 1960 the I.C.C. denied the petition of March 7, 1960, vacated the stay order of March 11, 1960, and reinstated its orders of June 9, 1959 and February 15, 1960. This cumulative disposition of July 5, 1960 is Order 3 under review in this Court.

Having portrayed the skeleton of the administrative proceedings before the I.C.C., and before examining in detail the factual record, we may notice the general nature of the principal questions which it presents.

(1) Is the order of June 9, 1959 invalid because it is not supported by findings which in form comply with the pro-

visions of the Administrative Procedure Act or with general principles governing I.C.C. procedure?

(2) Is the order of June 9, 1959 invalid because, even if the findings are proper in form, they are not supported by substantial evidence?

(3) Is the order of June 9, 1959 invalid because, even if the findings are proper in form and in substance, they lack the specific character adequate to support an order to Kenneth A. H. Nelson to divest himself of all his stock in Gilbertville Trucking Co.?

(4) Is the order of June 9, 1959 invalid because, even if the findings are proper in form and in substance, they do not warrant an order denying the merger application?

We now turn to a more detailed examination of the record before the I.C.C. In appraising this record we repeat that the only orders here under review are orders of the full commission and that the only questions now pertinent, as stated above, fall into two divisions: first, are the full commission's orders sustained by findings, made by it, adequate in form and in substance, and second, are those orders authorized by statutory provisions.

The best way to deal with the first set of questions is to set forth in full the essential portion of the text of the I.C.C. report of June 9, 1959, with the supporting transcript references conveniently supplied by defendants in this Court. But before this is done, it will be helpful to set forth, as it were, a syllabus of their import.

The text, about to be quoted, shows a close business relationship between Kenneth A. H. Nelson, his mother, and her six other children. Originally they were all associated as shareholders in the Nelson Co. And the seven children are even now associated as equal owners of The Bergson Company. In 1952 Kenneth was still the owner of 92 of the 500 shares of the Nelson Co. He was in that year paid

$15,650 as a "tariff consultant." The nature of this relationship and of this work is not precisely shown. Kenneth claims he held himself out not as an employee or officer but as an independent contractor; yet if he had clients other than Nelson Co. they were not shown. Moreover, in his work for Nelson his duties (properly inferrable from his title, his rate of compensation, and miscellaneous specific minor incidents,) trench upon administrative or executive rather than strictly independent professional advisory functions.

Kenneth continued as tariff consultant during part of 1953. Sanol J. Solomon, a public accountant, who had rendered Nelson Co. continuous services almost since its organization (Tr. 28), and who as a principal witness before the I.C.C. was on the stand for several days, testified that Nelson Co. paid Kenneth $13,800 in 1953, and that some of the services for which that payment was made were performed after Kenneth's acquisition of the stock of Gilbertville Co. (Tr. 427), that is, after March 2, 1953. That date is significant because, by a contract dated on that same March 2, 1953, Kenneth in cooperation with his half brother, Oscar Chilberg, and following consultation with Solomon, purchased all the shares of Gilbertville Co.

At a later date, Kenneth bought out Oscar. And the business of Gilbertville Co. continued and flourished under the direction and ownership of Kenneth.

At all times Nelson Co. and Gilbertville Co. shared the lease of a terminal at New York City. At four other terminals, owned by the previously mentioned family company, Bergson Co., Nelson Co. was a lessee, and Gilbertville Co. was a sublessee of Nelson Co. Telephones were shared at the terminal.

Equipment of one company is often leased to the other. Both draw upon the same group of drivers to some extent. There has been some commingling of traffic. Some items

of expense are shared upon a set formula, not shown to be other than arbitrary.

From these and other less significant subsidiary items, the I.C.C. purported to "affirm the findings in the prior report [of Division 4] and in the report of the examiner, that the control and management of Nelson [Co.] and Gilbertville [Co.] in a common interest has been effected and is continuing in violation of section 5(4) of the act."

This Court having supplied the foregoing "syllabus", the following quotation from the I.C.C. report of June 9, 1959, to which counsel have added in brackets the apposite transcript references, may now be set forth.

> "The evidence shows that Mrs. Linnea Nelson, with two of her seven children, Charles and Oscar Chilberg, inaugurated the business of Nelson as a partnership in 1930 [Tr., Chilberg, 480]. It was incorporated in 1947 [Tr., Solomon, 193, and Ex. A to application]. As of May 14, 1948, of the 500 shares of authorized capital stock outstanding, 300 shares were held by Mrs. Nelson and 50 shares each by Charles and Oscar, and Clifford and Kenneth Nelson [Tr., Solomon, 30-31, 194]. Mrs. Nelson died in 1950 [Tr., Solomon, 30-31, 194-95] and her stock, less 6 shares which subsequently became treasury stock, was devised 42 shares each to her seven children [Tr., Solomon, 31-32, 194, 212]. In June and September, 1951, and in January 1953, Oscar and Kenneth sold their stock (92 shares each) to Charles and Clifford, respectively, and resigned from the business [Tr., Solomon, 29-30, 32-34, 39, 195-99, 209, 211]. Since the latter date Charles and Clifford have held 226 shares each of the capital stock of Nelson [Tr., Solomon, 202, 213, 215-16, 277-78]. Kenneth and Oscar have been neither officers nor directors since 1951 [Tr., Solomon, 35-36]. However, from September 1, 1951, to March 1, 1953, Kenneth had an

office at one of Nelson's terminals where as a "free lance" tariff consultant, he served only Nelson [Tr., Solomon, 180-82, 269-74, 422-27; Ex. Repl., sh. 11], and was paid by Nelson $15,650 in 1952 [Tr., Solomon, 271-72] and $13,829 in 1953 [Tr., Solomon, 277, 425-427].

Under a contract of March 2, 1953 [Tr., appl. Ex.], after consultation with his accountant and financial adviser [Tr., Solomon, 50-51, 83, 312-13], Kenneth agreed to purchase the capital stock of Gilbertville, consisting of 100 shares, for a net consideration of $22,447 [Tr., Solomon, 67-68, 358-60], of which $10,000 was evidenced by a promissory note signed by him and Oscar [Tr., Solomon, 67-69, 324-36, 358-61, 371, 435]. A note of $30,000 was secured from a bank on a note signed by the same individuals to help finance the transaction and to furnish Gilbertville with working capital [Tr., Solomon, 55-56, 322-23, 330-31, 370-72, 460-61]. Upon the transfer of that stock 51 shares were held by Kenneth, 48 by Oscar, and 1 share by Kenneth's attorney [Tr., Solomon, 78-79, 160, 335-36]. In March, 1954, Oscar transferred his shares to Kenneth [Tr., Solomon, 161-62, 332-35] who, in turn, transferred 24 shares each to his wife and to the manager of their terminal at Gilbertville, apparently in name only [Tr., Solomon, 80-83, 161-63, 332-40; R. Nelson, 689-99, 719-23].

The Bergson Company, organized January, 1953, is a real estate holding company [Tr., Solomon, 420], whose 490 shares of stock are owned in equal amounts by the seven children, and they are its directors [Tr., Solomon, 172-73, 421]. Kenneth is not an officer of Bergson [Tr., Solomon, 173]. Of the five terminals utilized by Nelson in its operations, four are leased from Bergson [Tr., Solomon, 172-77, 430-32], includ

ing a terminal at Rockville-Ellington, Conn., which is also used as the headquarters of both Nelson and Gilbertville [Tr., Solomon, 148-49; K. Nelson, 699-700, 725]. The latter subleases terminal facilities from Nelson at Rockville-Ellington, Newton, Mass., and Woonsocket, R.I., owned by Bergson [Tr., Solomon, 172-77], and at New York City, owned by other parties [Tr., Solomon, 432, 447]. At a garage and repair shop maintained at Rockville-Ellington, Nelson performs about 25 percent of the repair work on the equipment of Gilbertville [Tr., Solomon, 165-66, 445-46; K. Nelson, 796-99, 824-27; Shea, 888-89, 1120-22].

At two of the terminals owned by Bergson, at the one in New York City, and at four other points, Nelson and Gilbertville have the same telephone numbers [Tr., Chilberg, 679-80; K. Nelson, 77-78, 786]. The total cost of leased interterminal telephone lines is $1,100 a month and Gilbertville pays Nelson $400 a month as sublessee [Tr., Chilberg, 679-81, 692, K. Nelson, 785-86, 805]. Nelson occasionally leases equipment from Gilbertville [Tr., Solomon, 168-70, 412-13; Chilberg, 484-85, 512-13], although the latter constantly and frequently leases from a pool of equipment maintained by Nelson [Tr., Solomon, 170; Chilberg, 524, 543-46; K. Nelson, 702-13, 819, Shea, 835-37, 844-46, 870; LaCour, 1023, 1029-31]. Both draw upon the same group of drivers [Tr., K. Nelson, 814-19; Shea, 853-54, 883; LaCour, 1005-09] and information relative thereto, including medical certificates, are maintained in the files of both companies [Tr., K. Nelson, 728-29, 814-16]. To the extent they interline [Tr., Chilberg, 495-99, 508; K. Nelson, 738-41] revenues are divided on a fixed percentage basis [Tr., Chilberg, 524-26, 691-92; K. Nelson, 707-09, 741-43; LaCour, 1016-20], and Nelson does all of the billing for such

traffic [Tr., Chilberg, 526-28; Shea, 854-59]. Frequently the same driver will be employed by both companies during the same pay period [Tr., K. Nelson, 814-20; Shea, 854, 883; Lacour, 1005-09], and on those occasions where a shipment moves from a point in the territory of one to a point in the territory of the other the same driver and vehicle will perform the through movement [Tr., K. Nelson, 782-83, 807-08; Shea, 1120-22], under prearranged lease arrangements [Tr., K. Nelson, 762-69, 813-14; Shea, 845-47, 1120-22]. The two companies use the same source for accounting and financial advice [Tr., Solomon, 27-28, 83, 144, 189-91, 348, 440-41]; each operates to some extent, at least, under managerial direction from officers of the other [Tr., Shea, 847-53, 860-61; LaCour, 1015-16], and they are liberal with each other in settlement of intercompany accounts [Tr., LaCour, 1021-22, 1028-29]. There has also been a commingling of traffic of the two carriers in the same vehicles whenever it suits their convenience [Tr., Shea, 901-915, 916-22, Com. Ex. 29; 925-932, Com. Ex. 30; 932-36, Com. Ex. 31; 936-40, Com. Ex. 32; LaCour, 1040-50, Com. Ex. 34].

As of March, 1953, Gilbertville had one truck, three tractors, and four trailers [Tr., Solomon, 69-70, and Appl. Ex. 22], and had a deficit in surplus of $30,868 [Tr., Solomon, 90]. As of December 31, 1953, however, it had a net worth of $18,935 [Id.]. In 1953 Gilbertville's revenues were $75,489 [Ex. B-6(3) to application], whereas for the first seven months of 1956 they had increased to $444,777 [Appl. Ex. 8]. Its equipment increased substantially during that period [Tr., Solomon, 233-38, 245-48, 408, Appl. Ex. 23; K. Nelson, 702-05, Appl. Ex. 25]. In 1953 the revenues of Nelson were $895,774 [Ex. A-7(3) to application] and for the first seven months of 1956 they were $630,607 [Appl.

Ex. 4]. Under an authority granted by this Commission, Gilbertville, on June 16, 1954, acquired the operating rights of one Louis Marner, doing business as Wolff's Express [Tr., Solomon, 234-35, 389, Ex. B to application, Sh. 6]. In April or May of 1954, Charles Chilberg and Clifford Nelson negotiated for the capital stock of R. A. Byrnes, Incorporated [Tr., Solomon, 386-90], herein called Byrnes, and upon approval of this Commission [on May 15, 1956, Division 4 report, 75 M.C.C. 45, at 54; Appendix "F" to complaint, Sh. 16], the transaction was consummated August 21, 1956 [Tr., Solomon, 389-90, 394-95]. The general-commodity authority of Byrnes [Ex. A to application, Sh. 1] complements that of Gilbertville [Ex. B to Application, Shs. 4 and 5], and by interchange a through service on general commodities can be provided between points in Massachusetts, Rhode Island, and Connecticut, on the one hand, and, on the other, points south thereof to the District of Columbia. Considering all the facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act."

Complainant's initial objection is that the language just quoted and other like passages do not constitute the sort of findings required by §8 of the Administrative Procedure Act, 5 U.S.C. §1007(b), or by established principles appropriately and traditionally governing findings of fact prepared by administrative agencies.

The answer is that it is no more requisite for agencies than for courts, acting under Rule 52 of Federal Rules of Civil Procedure, slavishly to set forth in wooden, numbered, footnoted paragraphs every step in the finding process. Cf. *Minneapolis & St. Louis R. Co. v. U. S.*, 361, U. S. 173, 193-194. Some agencies, like some courts, prefer to put findings in narrative form, in the hope of redeeming judicial writing from the charge that it is "arid, stilted, or, to borrow Chief Judge Cardozo's happy choice of an adjective, "agglutinative". If a fact-finder has the talent of Justice Holmes, his findings are not to be rejected because they are reminiscent of what (to adopt his three classical categories) Justice Holmes would have called a sting ray rather than a kitchen knife, or a razor blade. The purpose of findings of fact is to furnish the parties and the reviewing court with a sufficiently clear basis for understanding the premises used by the tribunal in preparing its conclusions of law, adjudications, and orders. This purpose the I.C.C. has fulfilled in the case at bar, as is demonstrated by the extended quotations set forth above. Indeed to prescribe for every fact-finder the mechanical process for which complainants plead would in all probability cause agency heads, judges, and others with like responsibility to depart further from the pungent, individualized standard of the best Anglo American judicial writing and to delegate more than they now do to anonymous law clerks. In the name of formality, rigor, and precision, we may woo the law of that style and distinction, which both reflect personal consideration and show a mastery of the art of successful persuasion.

The I.C.C. findings are satisfactory not merely in form but in substance. The transcript references enclosed in the quotations prove that the statements of the I.C.C. are supported by evidence. Admittedly a modicum of the findings are trivial to the point of demonstrable irrelevance. But

if a reviewing court rejects a particular item as imponderable or inconsequential, that court need not remit the case for excision of that item and for a re-weighing of the remaining mass. When a web of fact is woven *to evidence one dominant issue of fact*, (here the issue of common control) the pulling out of a few minor strings at points of less than crucial significance does not suggest that the net fails to hold. Nor does it require a new total appraisal.

Here complainants attack the I.C.C. for its inclusion in its report of some innocent conduct, or conduct of ambiguous nature. A reasonable reviewer would not conclude that the deletion of all reference to that conduct would alter or modify the I.C.C.'s ultimate and essential finding "that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act."

The next issue is whether as a matter of substantive law the subsidiary findings are adequate to show that sort of "control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly," which is proscribed by § 5(4) of the Act. The comprehensive statutory outlawing indicates a fixed Congressional determination to pierce veils and search for the naked truth. We are to look for the presence of unified power, not to palter over dictionary definitions, nor even to be our own lexicographer. Looking through the veil we see far, far more than one company owned by a brother of the dominant owner of another company, or one company managed by a former professional adviser of another company. Many phases of the two business have been allowed to converge and not just kept running in parallel series. We can see as the I.C.C. could see a design not of mere cooperation but of purposeful dovetailing for a common set of ends. Indeed the whole convergence begins with the purchase of shares in a second

company made by an individual at a moment when he is not shown to have severed a relationship to the arteries of traffic nerve of the first company. And, as to the interests, the operations of the two companies are so closely integrated as served by employees so closely identified by common avenues of public communication and approach that the ultimate finding made by the I.C.C. and the derived legal conclusion announced by the I.C.C. are not merely reasonable but inevitable to an unprejudiced, sophisticated mind. For this Court to reject this finding and this conclusion reached by a body informed of the transportation business and its practices sensitive to the policy it administers under legislative delegation, would be not merely to usurp an administrative function but to displace a legislative prerogative.

The foregoing reasoning does not (despite contrary arguments) require resort to any legislatively enacted definitions or presumptions. But it is meet to observe that the reasoning of the I.C.C. and of this Court is confirmed and at no juncture contradicted by the statutory definitions and presumptions. No more is necessary than to quote once more the relevant sections of the Act. Section 5(5) provides:

> "For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers * * *
>
> (a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;
>
> (b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to

place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier."

Section 5(6) provides:

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

And Section 1(3)(b) of the Act, 49 U.S.C. § 1(3)(b), which is applicable broadly to motor carriers as well as other carriers, provides:

"For the purposes of sections 5, 12(1), 20, 304(a)(7), 310, 320, 904(b), 910 and 913 of this title, where reference is made to control (in referring to a relationship between any persons or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or

trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(a), (b), 54 Stat. 899."

A penultimate issue is whether, having found that § 5(4) of the Act was violated by Kenneth's acquisition of stock in Gilbertville Co., the I.C.C. was empowered to order him to divest himself of the stock. Congress did not specify this remedy. It left the matter at large to the discretion of the I.C.C. The delegated power was conferred by § 5(7) in these words:

"Investigation by Commission of effectuation of control by nonprescribed methods. The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, and penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person. Feb.

4, 1887, c. 104, Pt. 1, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905."

These are words of adequate amplitude to authorize a divestiture order. *U.S.* v. *E.I. duPont de Nemours and Company*, Sup. Ct. of U.S., Oct. Term 1960 No. 53, May 22, 1961; *F.T.C.* v. *Mandel Bros.*, 359 U.S. 385, 392-393; *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 106, 112-113, 118; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 193-194. Indeed, when the I.C.C. has found that an offender has unlawfully acquired control of a carrier and continues to hold the acquisition, an order of divestiture has aptness so perfect that the order not merely is obviously a suitable exercise of discretion, but needs no gloss.

The point just made also answers complainants' contention that the I.C.C. order of June 9, 1959 is defective because it is not buttressed by a preceding finding specifically setting forth the considerations which, after careful weighing, led the I.C.C. to command the disgorging. When the wrong consists in yielding to an appetite for unlawful acquisition, no tribunal is called on to write an essay on why it has given greater weight to the public demand that the wrongdoer immediately discharge himself, than the private demand of the wrongdoer that he be allowed, absolutely or conditionally, to keep what he has swallowed. As the cases cited above show, the law is full of examples of similar complete remedies instantaneously imposed on prohibited acquisitions, no matter how much time has elaped since the forbidden event, no matter how embarrassing the requirement of prompt action in an unfavorable market. See *U.S.* v. *duPont*, above.

The final issue is whether the I.C.C. having found, upon investigation, that Kenneth had violated § 5(7) of the Act by acquiring and continuing control of Gilbertville Co., the

I.C.C. acted without statutory authority in using that finding as a basis for denying the application of Gilbertville Co. and Nelson Co. that, by merger, the former transfer its assets to the latter. Here the I.C.C. did no more than to refuse lawful unification to companies which it had found had precipitately and perilously effectuated a prohibited union without permission. Under some imaginable circumstances, to have granted the merger application might conceivably be in the public interest. But to deny application to formalize and strengthen a relationship already in part achieved by unlawful conduct is a clearly proper exercise of a delegated discretionary authority.

Inasmuch as the objections raised to the I.C.C. order of June 9, 1959 are all without merit, it follows that there can be no valid objection to the I.C.C. order of February 15, 1960 which merely reinstated it, nor to the I.C.C. order of July 5, 1960 which merely refused to allow Nelson Co. to escape the effect of the June 9, 1959 order by cancelling all its outstanding certificates of convenience and necessity.

Complaint dismissed with prejudice and costs.

[Report of the Commission on Reconsideration by the Commission in *The L. Nelson & Sons Transportation Co.—Control and Merger—Gilbertville Trucking Co., Inc.*, is published at 80 M.C.C. 257.]

[Report of the Commission by Division 4 in *The L. Nelson & Sons Transportation Co.—Control and Merger—Gilbertville Trucking Co., Inc.*, is published at 75 M.C.C. 45.]

INTERSTATE COMMERCE COMMISSION

No. MC-F-6099[1]

THE L. NELSON & SONS TRANSPORTATION CO.

CONTROL AND MERGER

GILBERTVILLE TRUCKING CO., INC.

Decided

1. In No. MC-F-6099, acquisition by The L. Nelson & Sons Transportation Co., of control of Gilbertville Trucking Co., Inc., through acquisition of its capital stock, and merger of its operating rights and property into the former for ownership, management, and operation; and acquisition by Charles G. Chilberg and Clifford J. O. Nelson of control of the operating rights and property through the control and merger, approved and authorized, subject to conditions.
2. In No. MC-F-6178, upon investigation, respondents found to have effectuated or participated in effectuating, and to be continuing, control and management of Gilbertville Trucking Co., Inc., and The L. Nelson & Sons Transportation Co. in a common interest in violation of section 5(4) of the Interstate Commerce Act. Investigation discontinued subject to condition.

Mary E. Kelley for applicants in No. MC-F-6099 and respondents in No. MC-F-6178.

Francis E. Barrett, Francis E. Barrett, Jr., Hugh M. Joseloff and *Arthur J. Piken* for protestants in No. MC-F-6099 and interested parties in No. MC-F-6178.

Robert G. Bleakney, Jr., William O. Keenan, James G.

[1] This report embraces also No. MC-F-6178, The L. Nelson & Sons Transportation Co.—Investigation of Control Gilbertville Trucking Co., Inc.

Lake, *T. W. Harrell*, and *Kenneth B. Williams* for interested parties in Nos. MC-F-6099 and MC-F-6178.

Ellis V. Gregory, *Neil Goin* and *Herman F. Mueller* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT PROPOSED BY WALTER L. BAUMGARTNER, *Examiner*

The L. Nelson & Sons Transportation Co., a corporation of Ellington, Conn., and Gilbertville Trucking Co., Inc., of Gilbertville, Mass., herein called Nelson and Gilbertville, respectively, by joint application *filed October 6, 1955*, in No. MC-F-6099 seek authority under section 5 of the Interstate Commerce Act, for (1) acquisition by the former of control of the latter through acquisition of its shares of stock by exchange, and (2) for the merger of the operating rights and property of the latter into the former for ownership, management, and operation. Charles G. Chilberg of Rockville, Conn., and Clifford J. O. Nelson of Dover, Mass., who are officers of, and control, Nelson through ownership in equal amounts of 91.50 percent of its capital stock, also seek authority under the same section to acquire concurrent control of the operating rights and property through the transaction.

By order entered December 20, 1955, in No. MC-F-6178, an investigation was instituted under section 5(7) of the Act, for the purpose of inquiring into and concerning the possibility that the control or management of Gilbertville in a common interest with Nelson may have been effectuated, and may be continuing, in violation of section 5(4) of the Act, and if such violations are found, of entering an order requiring the participants therein to take such action as may be necessary to prevent further such violations. Nelson, Gilbertville, Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson and Kenneth A. H. Nelson were named as respondents in the proceeding, herein sometimes

referred to as the investigation or investigation proceeding. By the same order, the investigation proceeding and the application were assigned for concurrent hearing and determination on a joint record. Since they are interrelated, they will be the subject of a single report.

At the hearing thirteen motor common carriers of property[2] and the eastern territory railroads appeared and participated in opposition to the application and as interested parties in support of the investigation. The applicants-respondents, each of the motor carriers and the Commission's Bureau of Inquiry and Compliance introduced evidence. The railroads limited their participation in the hearing to the cross-examination of applicants' and respondents' witnesses.

The carrier applicants-respondents operate more than twenty motor vehicles.

They press on brief objections made at the hearing to various rulings of the examiner. Objection was made to his ruling on the order of presentation whereby applicants were required to go forward with the evidence in support of the application prior to the presentation of evidence in the investigation proceeding. It is their position that, since Nelson's fitness to acquire and exercise the Gilbertville operating rights is involved in both proceedings, they were entitled to hear the evidence against them in the investigation proceeding first so that they might be apprised of the evidence against them before having to meet

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[2] Adley Express Co., Alvin R. Holmes d/b/a Holmes Transportation Service and/or Jones Express, Downing & Perkins, H. T. Smith Express Co., Hemingway Bros. Trucking Co., Jackson Transportation Corp., Lombard Bros., Inc., M & M Transportation Company, National Transportation Co., Newbergh Transfer, Inc., P. B. Mutrie Motor Transportation, Inc., Taylor's Express Co., and Westchester Motor Lines, Inc., herein called Adley, Holmes, Downing, Smith, Hemingway, Jackson, Lombard, M & M, National, Newbergh, Mutrie, Taylor and Westchester, respectively.

it in the application proceeding. They also claim that, as a result of the ruling, erroneous rulings were made upon improper efforts during the cross-examination of applicants' witnesses to elicit testimony helpful to the investigation. The examiner's ruling with respect to the order of presentation was in harmony with rule 1.74 of the Commission's General Rules of Practice prior to, and as amended, January 8, 1957, effective March 1, 1957, reading in pertinent part as follows:

> "In informal complaint, application, and investigation proceedings, complainant, applicant, and respondent, respectively, shall open and close at the hearing. * * * The foregoing order of presentation may be varied by the (hearing) officer, who shall also designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

The examiner's rulings upon objections made to questions and upon the admissibility of evidence during such cross-examination have been carefully examined and found proper. In any event, if erroneous in any respect, the rulings to that extent were harmless error. Since the investigation is not a criminal proceeding but civil in nature and conducted to enable the Commission to issue such corrective orders as may be necessary and appropriate to secure compliance with the Interstate Commerce Act, and since the investigation involved matters bearing upon the fitness of the applicant Nelson, an issue upon which applicants have the burden of proof and upon which opposing carriers have the right to submit evidence in rebuttal, in the application proceeding, and since applicants-respondents have failed to establish that they were in any way prejudiced by the ruling on the order of presentation, there is no basis for a finding

that the examiner abused his discretion therein and the Commission should overrule the objections thereto.

Applicants-respondents also assert error in various rulings upon their objections to questions propounded by the Bureau of Inquiry and Compliance to two witnesses produced by it upon the ground that the questions called for hearsay statements. The two witnesses were employees of the Commission who, during the course of an investigation of the operations of Gilbertville and Nelson, were given certain information with respect thereto in response to oral inquiries by a Gilbertville director and terminal manager and by Kenneth Nelson, president of Gilbertville, and by Clifford Nelson and Charles Chilberg, secretary and president, respectively, of Nelson. All of these gentlemen were actively engaged in the performance of managerial functions of one or both of the carriers. Over objection, one of the witnesses was permitted to testify to statements made to him by the terminal manager as to his connections with Gilbertville his previous employment by Nelson, his receipt from Kenneth of 24 shares of Gilbertville stock, the practices followed by the two carriers in effecting through movements of shipments under equipment leases between them and the repair of Gilbertville equipment in Nelson's shop at Ellington. The facts respecting the declarant's relationship and connection with the two carriers were already of record through other evidence. The equipment leasing and repair practices were matters within the scope of his employment concerning which, as an agent, he could speak with authority and binding effect upon his employer, a party to both proceedings here. His statements were admissions against interest or voluntary acknowledgements made by Gilbertville through its agent within the scope of his employment. 31 C. J. S., paragraphs 270, 271, and 272, pp. 1022-1024; *Pan American Petroleum & T. Co. v. U. S.*, (1927), 273 U.S. 456, 499; *Takahashi v. Hecht Co.*,

(1931), 50 F.2d 326, 328. The repetition on the witness stand of information elicited by the witnesses from Kenneth and Clifford Nelson and Charles Ohlberg was clearly admissible hearsay since it disclosed admissions against interest by parties to the proceedings who were also officers and agents of the corporate parties. 31 C. J. S., paragraph 354, p. 1128; *Pan American Petroleum & T. Co.* v. *U. S.*, *supra*.

Error is also claimed in the examiner's rulings preventing testimony of the same two witnesses as to the provisions of Commission regulations and the law applicable to acts of the respondents alleged to be unlawful. The testimony of a witness as to what the domestic as distinguished from foreign law is wholly incompetent. The courts, and, hence, the Commission must take judicial and official notice of Federal statutes and agency regulations. The sources are open to the courts and the Commission and it is their duty to hear the evidence and determine for themselves the law applicable thereto. *U. S.* v. *Hohlfeld*, (1932), 2 F. Supp. 832, 836; *W. U. Tel. Co.* v. *White*, (Tex. 1914) 162 S. W. 905, 909; *Owens* v. *National Hatchet Co.*, (Iowa 1909), 121 N. W. 1076, 1079; 44 U. S. C. 307; Rule 1.75, General Rules of Practice.

On November 12, 1954, one of the witnesses referred to above, while visiting Gilbertville's terminal at Newton, Mass., in the pursuance of his duties, discovered and made a copy of a teletype message made and received at the terminal. It was received in evidence as an exhibit after an explanation of its source and of its contents by the witness. It related to the handling of Gilbertville freight and the use of its vehicles. Objection was made both to its reception in evidence and to the witness's explanation of its contents on the ground that its contents were not clear, etc. A portion of its text will be set out later in this report. Suffice it to say at this point that an analysis of it makes

its meaning clear and establishes its relevancy. The objection made goes to its weight rather than its admissibility or competence.

Error by the examiner is also claimed by a ruling excluding the testimony of an accountant, called as a witness by applicants, with respect to Gilbertville's operating revenues for periods prior to Kenneth Nelson's purchase of it. Objection was sustained on the ground that the accountant not having compiled the figures and not having checked them against the underlying data from which they were taken was not qualified to testify as to their accuracy and significance particularly on cross-examination. On brief, applicants-respondents rely upon rule 1.79 of the General Rules of Practice which embodies in part the "shop-book" rule of evidence relating to the admissibility of any writing or record made as a memorandum or record of any transaction if made in regular course of business at the time of the transaction or shortly thereafter, etc. As no proper foundation had been laid to render the testimony admissible, the ruling was clearly correct, and if not, it was harmless error, since the relevance or materiality of the testimony sought is not apparent and was not shown.

Two motions were filed by applicants-respondents requesting that parts of two briefs filed by motor carriers opposing the merger be stricken. The Commission is requested to strike two parts of the brief filed in behalf of Mutrie, Holmes, Newburgh and Taylor, each of which is asserted to contain "libelous" statements with reference to applicants-respondents wholly lacking in evidentiary support. In answer, counsel for Mutrie et al. request that the Commission strike from the brief any comment which it feels is in the slightest degree improper or in contravention of any rule of the Commission. Rule 1.4(d) of the General Rules of Practice provides that the Commission may order any redundant, immaterial, impertinent or scandalous

matter stricken from any pleading, document or paper filed with it. The portions of the brief under criticism contain arguments made in good faith and evolved in the author's consideration of matters in evidence. Not all may agree that his reasoning or deductions are sound; but they appear to be permissible and plausible. The slight amount of intemperate language may be ascribed to overzealousness in argument which usually does not generate conviction and sometimes defeats its own purpose. The motion to strike should be denied.

The second motion is directed to the brief filed in behalf of Adley, M & M, and Hemingway and requests the striking of three portions thereof. The first two are challenged as efforts to import into the record or to draw attention to matters not of record. Since such matters have in no way been shown to be relevant or material to the issues here, they will be disregarded even though not stricken. The third portion sought to be stricken appears to be legitimate argument based upon facts in evidence. Much of the considerations urged in support of the motion appears to be in the nature of a reply to the brief and may not be weighed since reply briefs were not contemplated here. The motion should be denied.

BACKGROUND AND CORPORATE ORGANIZATIONS

Mrs. Linnea Nelson, married twice, was the mother of seven children, viz., Charles C., Oscar H., and Howard Chilberg, Kenneth A. H. and Clifford J. O. Nelson, Greta C. Nelson Carlson and Ruth Nelson Widhaim Nyberg. Mrs. Nelson, in partnership with two of her sons, Charles and Oscar Chilberg, inaugurated the Nelson transportation business in 1930. The L. Nelson & Sons Transportation Co. was incorporated under the laws of Connecticut on February 7, 1948. Of the 500 shares authorized, all common, 496 were issued to her and one share each to four of her

sons, viz., Charles and Oscar Chilberg and Clifford and Kenneth Nelson. On May 14, 1948, she transferred 49 of her shares to each of those sons, thus increasing their holdings to 50 shares each, and reducing hers to 300 shares. In January 1949, she was president and treasurer, Oscar vice-president, Kenneth assistant treasurer, and Clifford secretary. On January 5, 1950, Mrs. Nelson died, testate, devising 42 shares of her stock to each of her seven children (total 294). The other six shares were purchased from the estate by Nelson and held as treasury stock. During the administration of her estate, her 300 shares were voted under proxy by Charles, who was one of the three executors.

On June 30, 1951, Oscar sold his 50 shares to Charles and resigned as an officer and director of the corporation. On September 22, 1951, Kenneth sold his 50 shares to Clifford and likewise resigned as an officer and director. Neither has since been an officer or director of the company. Howard, who was employed as office manager, severed his employment in 1951.

Stock distribution from Mrs. Nelson's estate was made on January 24, 1953, at which time Kenneth transferred his 42 shares to Clifford in accordance with his agreement to sell made September 22, 1951. Oscar sold his 42 shares to Charles. Shortly thereafter Howard Chilberg and Ruth Nelson Nyberg sold their respective shares in equal amounts to Charles and Clifford. Hence, ever since then, Charles and Clifford have each held 226 shares and Greta Nelson Carlson 42 shares. Charles is now president, treasurer and a director, Clifford secretary, assistant treasurer and a director and Greta Carlson a director.

R. A. Byrnes, Incorporated, formerly of Mullica Hill, N.J., is a motor common and contract carrier controlled through stock ownership by Charles, Chilberg and Clifford Nelson pursuant to authority granted by the Commission on August 21, 1956, in MC-F 5749. Its books and records are

kept at, and its operations are directed from, the Ellington-Rockville, Conn., terminal where Nelson and Gilbertville are headquartered.

Gilbertville is a Massachusetts corporation organized June 26, 1940, with an authorized capital of 100 shares of no par common stock. For corporate purposes, its principal place of business is registered as Gilbertville, Mass. In January, 1953, all of the stock was owned by Wilfred Vachon. At that time, Kenneth began negotiations for, and sought the advice of his accountant and financial adviser with respect to, their purchase. By a contract, dated March 2, 1953, Kenneth agreed to buy the stock for $35,000, out of which were paid in accordance with the contract, all liabilities of the corporation in excess of its good current assets. Vachon realized a net of $22,147, of which $12,147 was paid him in cash and $10,000 by a promissory note signed by Kenneth Nelson and Oscar Gilberg. The note was payable at the rate of $500 per quarter, interest at 4%, and secured by an escrow of the stock purchased. To assist in financing the transaction, $30,000 was borrowed from a bank upon a promissory note signed by Kenneth and Oscar. Of the amount so borrowed, $5,000 was advanced to Gilbertville by Kenneth for working capital. The $10,000 note to Vachon was paid off within a year by checks drawn on Gilbertville, signed by Kenneth. The $30,000 borrowed from the bank had not been repaid as of the time of the hearing. The 100 shares were transferred to Kenneth who in turn transferred one qualifying share to his attorney and 48 to Oscar. Kenneth became president, Oscar treasurer, and the attorney, clerk. All became directors. In March of 1954, Oscar caused transfer of his 48 shares to Kenneth who then transferred 24 to his wife and 24 to John Kashady, Gilbertville's terminal manager at Gilbertville, to enhance his prestige. Oscar resigned as treasurer and director. Kenneth became treasurer in addition to his presidency and the four stock-

holders became directors. Neither Kenneth's wife nor Oscar nor Kashady paid anything for the stock transferred to them. Oscar was not a party to the purchase contract, never took an active part in the affairs of the corporation, invested no money therein and received no salary or other compensation from it. Kenneth testified, in effect, that he is the beneficial owner of the stock and can deliver it to Nelson if the merger is approved.

The Bergson Company, herein called Bergson, an outgrowth of the estate of Linnea Nelson, is a real estate holding company organized in January, 1953. Each of her children holds 70 of the 490 outstanding shares of the company. Oscar is president, Charles is vice-president and treasurer, and Clifford is secretary. All of the children serve as directors and receive $360 per year each as salary. No dividends are paid. Certain of its properties, approximately two-thirds in value and 10 percent in area, are leased to Nelson and used by it and, under sublease, by Gilbertville as will be more particularly noted later.

OPERATING AUTHORITIES INVOLVED IN MERGER

On April 27, 1955, in No. MC-42871, Sub. 3, a certificate was issued to Nelson authorizing operation in interstate or foreign commerce as a motor common carrier of (a) materials used in the manufacture of cloth, waste materials resulting therefrom, and supplies and materials used in connection with transportation or processing of such commodities, when moving to or from places of processing, except liquid commodities, in bulk, in tank vehicles, over irregular routes, (1) between Hudson, North Chelmsford, Norton, Lowell, Lawrence and Marlboro, Mass., on one hand, and, on the other, Manchester, Concord, and Somersworth, N.H., and points in Providence and Bristol Counties, R. I.; (2) between Providence, Woonsocket and Pawtucket, R.I.;

Hartford, Hazardville and Somersville, Conn., and points in Massachusetts east of the Connecticut River, on the one hand, and on the other, New York, N.Y., Jersey City, Passaic, Newark and Camden, N.J., Philadelphia, Pa., and points in Pennsylvania within 30 miles of Philadelphia; (3) between Hazardville, on the one hand, and, on the other, Millbury and East Douglas, Mass.; (4) from Philadelphia and Camden to points in Tolland and Hartford Counties, Conn., on and north of U.S. Highway 6; and (5) empty containers used in transporting the commodities named above, over irregular routes from the said points in Tolland and Hartford Counties to Philadelphia and Camden. Nelsen also holds intrastate general commodity irregular route authority in Connecticut and Massachusetts.

On April 1, 1941, in No. MC-93086, a certificate was issued to Byrnes authorizing operation in interstate or foreign commerce as a regular-route common carrier over irregular routes (a) of general commodities, except explosives, poles, canned foods and commodities used in canning or processing food, (1) between New York City, on the one hand, and, on the other, Philadelphia and points in Pennsylvania within 25 miles thereof and those in New Jersey; (2) from points in New Jersey to Philadelphia and points within 25 miles thereof; (3) from New York City and points in New Jersey to those in portions of Delaware, Maryland and Virginia and all of the District of Columbia; (b) of fertilizer from Baltimore, Md., and Philadelphia to points in New Jersey; (c) of oil in containers from Claymont, Del., to Camden; (d) of foodstuffs, except that used in processing food, from Gloucester, Salem and Cumberland Counties, N.J., to the District of Columbia and to certain portions of Pennsylvania and New York. On April 25, 1941, in No. MC-93421, a permit was issued to Byrnes authorizing operation in interstate or foreign commerce as a contract carrier over irregular routes, (a) of commodities used in canning

or processing food from New York City, Philadelphia and Baltimore to Swedesboro, N.J.; and (b) of canned goods from Swedesboro to Massachusetts, Rhode Island, Connecticut, Delaware, Maryland and the District of Columbia, Virginia within 25 miles of the District, and portions of Pennsylvania and New York. Upon Byrnes application in No. MC-93421 Sub-1, the Commission by a report, dated August 16, 1956, ordered, among other things, the enlargement of the operating authority above-described to include "canned goods from Philadelphia to Swedesboro" and found that the holding by Byrnes of a permit containing the operating authority as so enlarged concurrently with the holding by Nelson of the certificate in No. MC-42871 will be consistent with the public interest. *R. A. Barnes, Inc.—Ext.—Canned Goods*, 68 M.C.C. 57.

On February 25, 1955, in No. MC-87431, a consolidated certificate was issued to Gilbertville authorizing operation in interstate or foreign commerce as a common carrier of (a) general commodities, with the usual exceptions, over 17 described regular routes between Lowell, Mass., and Boston, Mass., serving 31 intermediate, and 5 off-route, points in Massachusetts, (b) the same commodities over irregular routes between points in Massachusetts, (c) the same commodities over irregular routes (1) between the Town of Hardwick, Mass., on the one hand, and, on the other, New York City and points in New York and New Jersey within 20 miles of New York City, (2) between Palmer, Mass., and points in Massachusetts within 10 miles of Palmer, on the one hand, and, on the other, points in Connecticut and Rhode Island, (3) between Palmer and Monson, Mass., on the one hand, and, on the other, points in Massachusetts within 5 miles of Palmer and Monson, (d) of sanitary napkins, facial tissues, and paper boxes over regular routes between New York City and Wilmington, Del., serving Philadelphia and the off-route point of Rockland, Del., and (e)

of sanitary napkins, facial tissues, and machinery, over irregular routes, from Hardwick, Mass., to Boston, New York City and points in New York and New Jersey within 20 miles of New York City, (f) materials used or useful in the manufacture and sale of sanitary napkins and facial tissues, in the reverse direction, (g) pickled skins from New York City to Ipswich and Peabody, Mass., (h) pulpboard from Boston to Hardwick, (i) fertilizer and fertilizer materials from Portland, Conn., to Hardwick and points in Massachusetts within 15 miles of Hardwick, (j) lime and limestone products from Adams and Lee, Mass., to Hamden, East Hartford, and Hartford, Conn., Providence and Woonsocket, R.I., New York City and points in New Jersey within 10 miles of New York City, (k) agricultural commodities from Hardwick to Melrose, Conn., and New York City, (l) household goods between Palmer and points in Massachusetts within 10 miles of Palmer, on the one hand, and, on the other, points in Vermont, and between Hardwick and points in Connecticut, New Jersey, New York and Rhode Island; and (m) livestock between Palmer and points in Massachusetts within ten miles thereof, on the one hand, and, on the other, points in Vermont. The operating authority described in (a) and (b) above was transferred to Gilbertville for $7,500 cash pursuant to a purchase agreement by Lewis R. Marmer on August 12, 1954, under approval given in No. MC-FC-57090.

THE MERGER AGREEMENT

Under the terms of the agreement dated August 18, 1955, between Kenneth Nelson and Gilbertville on the one hand and Nelson on the other, reciting a mutual desire to merge the respective motor transportation businesses of the two carriers, Kenneth would within 60 days after the effective date of the final order of the Commission approving the transaction, transfer to Nelson all of the shares of Gilbert

ville stock in full consideration for which Nelson would transfer to Kenneth as many shares of Nelson stock as may be due him based on the then net book value of the respective corporations after provision for Federal and State corporation taxes as of the date of the transfer. It was recognized and acknowledged in the agreement that upon that basis, if consummation had been effected on May 31, 1955, the relationship of the net book values were such that Kenneth would have received 85 shares of Nelson stock for his 100 shares of Gilbertville stock. An exhibit in evidence shows that if consummation had taken place on July 31, 1956, Kenneth would have received only 78 shares of Nelson stock. It was further agreed that as soon after approval of the transaction by the Commission as practical Nelson would seek authorization from the proper authorities to increase its capital stock by an amount necessary to carry out the agreement. Each corporation agreed to an audit of its books by the other to enable computation of the respective book values of their shares. It was further agreed that any party to the agreement whose rights would be diminished or obligations increased by compliance with any condition or limitation which the Commission might attach to its approval of the transaction may terminate the agreement upon proper written notice to the other party within 10 days after receipt of the final order of the Commission. Gilbertville agreed to cooperate in the preparation and filing of the "application for merger of the properties of Gilbertville and Nelson." While the agreement contains no provision for the assumption by Nelson of Gilbertville's liabilities, it was represented at the hearing and is the understanding of the parties that it is to do so.

FACILITIES AND OPERATIONS

As of July 31, 1956, Nelson owned and operated 14 trucks, 61 tractors, and 83 trailers. On the rare occasions

when it may be necessary to augment its fleet, it leases equipment from Gilbertville. Nelson has 110 employees: 10 office employees, 5 terminal managers, 5 dispatchers, 6 mechanics, 3 utility men, 2 salesmen and 79 drivers. It maintains five terminals; one each at Rockville-Ellington, Conn., Newton, Mass., Woonsocket, R.I., Long Island City (which is within New York City), and Philadelphia. All of the terminals, except that at Long Island City, are leased from Bergson at a total monthly rental of $675 or $8,100 per year. Occupancy of the Long Island terminal is shared, without assignment of specific space, with Smith & Jordan a motor carrier from which Nelson rents space, Gilbertville and Byrnes. The premises at Rockville-Ellington consists of a yard, a two-story building the first floor of which is occupied by Nelson and Byrnes as headquarters and the second floor of which is occupied by Gilbertville for similar purposes, and another building in the rear used as a terminal. Nelson maintains a garage and repair shop on the premises where five mechanics are employed. It employs a dispatcher at each terminal, with instructions to dispatch only its equipment and drivers. It leases, and shares with Gilbertville and Byrnes the use of, telephone lines connecting all of the terminals and Bridgeport, N.J.

Under temporary authority from the Commission Charles Ohlberg and Clifford Nelson assumed control of Byrnes on August 12, 1954, and have been operating it since then.

Nelson renders overnight service between its New England points and those in the areas in New York, New Jersey and Pennsylvania it is authorized to serve. Over 75 percent of its total traffic is interstate and 70 to 75 percent is truckload. About 8 percent in dollar volume is interlined with Gilbertville and 15 to 20 other carriers, of which approximately 6 operate in the same area as Gilbertville. Only 2 to 3 percent is interlined with Gilbertville.

The operations of the latter are chiefly irregular route in the performance of call-or-demand overnight service. Its interstate traffic preponderates. It endeavors to observe its Hardwick and Palmer gateways in accordance with its operating authority. About 70 to 75 percent of its operating revenues are derived from business local to its lines and about 25 to 30 percent from interline traffic. Interline is made with approximately 50 motor carriers, including Nelson and Byrnes. Divisions of revenues with carriers with which interchanges are frequent is upon a fixed percentage basis regardless of the length of the hauls as between the respective carriers. Thus the division with Nelson is 60 percent to Nelson and 40 percent to Gilbertville. With respect to some other carriers, the division is upon a mileage prorate basis.

When Kenneth took over in March 1953, Gilbertville had one truck, three tractors and four trailers. As of July 31, 1956, it had 15 trucks, 12 tractors and 8 trailers with a depreciated ledger value of $106,828. Except as to four used tractors purchased from Nelson in October, 1954, for $200 each (depreciated on Nelson's books to $100 each) all additions to equipment were new units. Gilbertville augments its fleet almost daily by leasing equipment in varying amounts from Nelson. It has a terminal at Gilbertville, Mass., and, in conjunction with Nelson, one each at Rockville-Ellington, Newton, Woonsocket and New York City, at each of which it provides collection-and-delivery service on less-than-truckload shipments. About three units per day are used in over-the-road operation between New York City and Massachusetts points. At each terminal, except Rockville-Ellington, it employs a terminal manager, and at Rockville-Ellington and New York City, dispatchers. In all, it employs 71 persons: 53 drivers, 4 terminal managers, 3 dispatchers and 10 office employees. Its principal bookkeeping and transportation records are kept at the Rockville-Ellington headquarters.

INTERRELATIONS OF THE APPLICANTS

Although Kenneth Nelson disposed of his stock in, and resigned as an officer of Nelson in September, 1951, he continued to have an office on Nelson's premises at Rockville Ellington. As a "free lance" tariff consultant, he rendered bills to, and was paid periodically by, Nelson in the total amounts of $15,650 in 1952, and $13,829 in 1953. From March 1 of 1953, he was in control of and operated Gilbertville. For that year, its administrative and general expense amounted only to $4,389. For 1954, such expense jumped to $21,927 and, for 1955, to $40,124. On their visit to Nelson's office at Rockville-Ellington in November, 1954, two employees of the Commission engaged in investigation observed Kenneth engaged in activities believed to be in furtherance of Nelson's business. Among other things, they noticed him at a desk answering telephone calls, issuing orders over an intercommunication system, and operating a teletype machine. At that time Nelson's terminals were equipped with intercommunicating teletype machines. Kenneth tore two to three yards of the teletype tape covered with messages of the machine and folded it. About 20 to 30 minutes later, one of the Commission's men requested production of the tape for inspection and was told by Kenneth that he had destroyed it. Another such request made after exhibiting to him a copy of Commission regulations requiring preservation of carrier teletype messages for three years, elicited the same response. Upon inquiry addressed that day to Clifford Nelson, he offered no explanation of Kenneth's activities in the Nelson office. Some time during the ensuing year, interterminal telephone lines had been substituted for the teletype service because, Kenneth explained, the latter was found to be very slow and required the use of a skilled operator.

John Kashady, Gilbertville's director and terminal man-

ager at Gilbertville, Mass., had been employed by Nelson for 15 years prior to his connection with Gilbertville.

On November 12, 1954, one of the Commission's employees found at the Newton terminal occupied jointly with Nelson, a record of teletype messages transmitted apparently by Clifford Nelson from Rockville-Ellington giving instructions to some one at the Newton terminal. In substance, they and the answers were as follows:

> Oh don't tell me a truck is going to come home empty. Over. Not at all, will have enough freight and could have more. Over. OK, make sure that any Gilbertville freight is in sealed envelopes and driver doesn't know he has it. That goes for Woonsocket. I will tell him also. How about Friday. Over. ***** OK. Make sure you send the mats on as the truck will be there first shot. Also put on a Gilbertville bill. And a lease too? No. Certainly not. It is only 4 bales. That isn't all the truck has, is it? No. OK. I said to put the pro in a sealed envelope. You can only use a lease when the whole thing is. Yes, I get it. I made out a lease for the oil load and had Rose with a tractor already leased with signs.

The signs presumably referred to the placards required on leased vehicles by Commission regulations to show ownership and lessee.*

On November 8, 1955, the Commission employee again visited the Newton terminal and there observed a Nelson truck under lease to Gilbertville. The load included 14 bales of silk for which there were no shipping papers. Clifford Nelson being present, this was called to his attention, whereupon he called New York and thereafter a Gilbertville freight bill covering the silk was prepared.

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*The testimony and exhibit on which the matter between these asterisks was based were ruled out of evidence by Division 4. (75 M.C.C. at 48)

Terminal and office facilities at Rockville-Ellington, Woonsocket and Newton, owned by Bergson, are jointly used by Nelson and Gilbertville; the former as primary lessee and the latter as a sublessee of the former. For those three and the terminal at Philadelphia, occupied only by Nelson, it pays Bergson total rentals of $8,100 annually. The terminal space at New York, rented by Nelson from another carrier, is also jointly used by Nelson, Gilbertville and Byrnes. Monthly rentals paid are as follows:

	Since 1-1-1956		Prior to 1-1-1956	
	Nelson to landlord	*Gilbertville to Nelson*	Same	
Long Island City	$500	$250	Same	
	Nelson to Bergson	*Gilbertville to Nelson*	*Nelson to Bergson*	*Gilbertville to Nelson*
Rockville-Ellington	$275	$100	$275	$50
Woonsocket, incl. use of telephone	100	100	100	25
Newton, incl. use of telephone	100	50	100	25

At Long Island City, Woonsocket, Newton, Philadelphia, Boston, Lowell, and Worcester, Nelson and Gilbertville have the same telephone numbers. The total costs of the leased interterminal telephone lines and the listings at the various terminals are approximately $1,100 per month, paid by Nelson and $400 of which is reimbursed to it by Gilbertville. At Rockville-Ellington, the same premises are occupied by Nelson, Gilbertville and Byrnes as headquarters and a terminal.

In October, 1954, Nelson sold to Gilbertville four tractors at $200 each which had already been depreciated on Nelson's books to a salvage value of $100 each. At another time, Nelson sold to Gilbertville two trucks.

Gilbertville's fleet is continually augmented by vehicles leased from Nelson. It usually has about three trucks and

two to three tractors on term leases (30 days or more) from Nelson; and, in addition, it usually leases from Nelson on a trip-lease basis from one to six complete units (tractors and trailers) and a couple of trailers each day. On rare occasions, Nelson leases vehicles from Gilbertville.

At the Gilbertville and Rockville-Ellington terminals, Gilbertville keeps lists of Nelson-owned vehicles described by type, registration, vehicle, and serial number and make to facilitate leasing. These lists and a pile of executed leases covering complete tractor-trailer units were observed by a Commission employee engaged in investigation. For convenience, printed form leases and vehicle inspection reports are used. On November 8, 1955, literally hundreds of executed leases were available for inspections by another Commission employee.

The terminal manager at Gilbertville explained to the commission employee that usually when either company handled a shipment destined for a point on the lines of the other, a vehicle was leased by the destination carrier from the other and the same driver was employed, thus enabling performance of an uninterrupted through movement.

On November 8, 1955, Gilbertville owed Nelson approximately $19,000 in equipment rentals. For the period, January 1, to July 31, 1956, such rentals amounted to $7,065.03. During an investigation at the Rockville-Ellington terminal, the Commission employees found that Gilbertville had on hand a complete file of doctor's certificate for all of Nelson's drivers, that in numerous instances the same driver was employed by both during the same payroll period, and that the drivers of both were using the same time-recording clock. They also observed a posted seniority list of Nelson drivers upon which appeared the names of five or six Gilbertville drivers. Names of Nelson drivers were found in Gilbertville records. At that time, Kenneth admitted that the same driver might be employed by both

companies during the same payroll period and even during the same day; that the duplication of drivers' medical certificates in the files of both companies was an industry practice and precautionary measure to insure compliance with the Commission's safety regulations.

At least 25 percent of the repairs on Gilbertville's vehicles are made by Nelson at Rockville-Ellington. Nelson pays its mechanics two dollars an hour, it charges Gilbertville three dollars an hour, and, for parts, cost plus 10 percent. The monthly cost of such repairs range from $ 00 to $400. Gilbertville maintains a mechanic at New York City. It also buys oil and motor fuel from Nelson at Newton.

It interchanges freight with many carriers; about 3 per cent in terms of its total revenue, with Nelson, and another 4 to 5 percent with Byrnes. Points of interchange with Nelson are Monson, Gilbertville (which is in the Town of Harwick, and Rockville-Ellington. Its division of interline revenues with Nelson is a constant 40 percent regardless of length of respective hauls. The evidence shows that divisions between carriers are customarily computed on a mileage pro rata basis and sometimes on a fixed percentage basis. At Rockville-Ellington, it was learned that Nelson did all of the billing on shipments interlined with Gilbertville, regardless of whether prepaid or collect and regardless of which carrier made delivery. On November 8, 1955, Nelson owed Gilbertville over $30,000 for interline settlements. Since, as Kenneth testified, only about 5 percent of Gilbertville's operating revenues, which for the years 1953 through 1955 were $616,544, the size of the indebtedness indicates an accumulation during the whole of the three years.

At various times and places, Commission employees in the performance of their duties observed some seven or eight instances of the movement of the shipments of one

carrier by the other. Thus, it may be reasonably inferred that they engaged in the practice of commingling or pooling their shipments to suit their convenience.

FINANCIAL DATA

Balance sheets of Nelson and Gilbertville show:

NELSON

	As of 7-31-56	As of 12-31-55
ASSETS		
Cash	$ 5,572	$ 13,313
Notes receivable	3,732	3,820
Accounts receivable, less reserve for uncollectibles	70,815	86,475
Prepayments	27,095	18,594
Material and supplies	9,549	8,942
Total current assets	116,763	127,324
Tangible property (operating) net	444,650	294,295
Intangible property	0	0
TOTAL ASSETS	$561,413	$421,619
LIABILITIES		
Notes payable	$ 13,563	$ 20,000
Accounts payable	42,762	55,159
Wages payable	12,275	9,362
Accrued taxes	11,303	15,425
Total current liabilities	79,903	99,946
Advances payable (notes payable officers and not within 1 year)	46,527	16,298
Equipment obligations	269,955	152,806
Reserves (injuries, loss and damage, income taxes)	7,585	11,102
Total liabilities	403,970	280,152

Capital stock	49,400	49,400
Surplus, including net profit, less taxes	108,043	92,067
TOTAL LIABILITIES AND CAPITAL	$561,413	$421,619

GILBERTVILLE

(As adjusted at hearing)

	As of 7-31-56	As of 12-31-55
ASSETS		
Cash in banks	$(4,508)	$ 10,068
Accounts receivable, less reserve for uncollectibles	55,063	48,084
Prepayments	6,169	2,384
Material and supplies	0	0
Total current assets	57,324	60,536
Tangible property (operating) net	112,376	55,116
Land	4,175	
Intangible property		
Organization	150	150
Franchises, less reserve for amortization	5,750	6,625
TOTAL ASSETS	$179,775	$142,427
LIABILITIES		
Accounts payable	$ 32,543	$ 50,622
Wages payable	14,334	5,575
Taxes accrued	14,335	9,681
Equipment obligations due within 1 year	38,369	18,207
Total current liabilities	95,581	84,085
Notes payable officers	20,035	19,597
Equipment obligations	34,423	14,764

Reserves (injuries, loss and damage, income taxes)	5,088	5,510
Total liabilities	$155,187	$128,556
Capital stock	100	100
Surplus (including net profit, less taxes)	24,488	13,771
TOTAL LIABILITIES AND CAPITAL	$179,775	$142,427

Operating statements of the two carriers show the following revenues and net incomes:

	Operating revenues	Net income or loss Before income taxes	After income taxes
NELSON			
1953	$895,774	$21,078	$13,082
1954	889,420	3,296	2,037
1955	924,607	17,869	12,106
1956 to August 1	630,607	18,600	15,976
GILBERTVILLE			
1953	$ 75,489	$22,839	$20,314
1954	117,818	(1,158)	(2,489)
1955	123,237	4,573	2,955
1956 to August 1	444,777	9,588	6,117

It is noted that for the year 1953, Gilbertville's operating revenues were $75,489, its administrative and general expense $4,389, and net income $20,314, whereas for the year 1954 its operating revenues climbed to $117,818, its administrative and general expense to $34,027, and its net income fell to a loss of $2,489.

The "giving effect" balance sheet as of July 31, 1956, reflects the increase in Nelson's corporate shares from 500 to the 378 that would have been issued to Kenneth Nelson if consummation of the transaction had been effected on

that date, calculated according to the formula contained in the contract of August 18, 1955. It also shows that as of that date, the combined current assets of the two companies were $174,087 against combined current liabilities of $155,484, after an adjustment at the hearing to include $8,339 in equipment obligations due within one year.

Consummation of the transaction will require no new borrowing and it is anticipated that Nelson will have no difficulty in financing it, in view of the projected combined net incomes and the increases expected therein through operating economies. Applicants indicated at the hearing that Nelson has no objection to the immediate write-off of the amount assigned to its "Other Intangible Property" account as a result of the transaction, and, if approval is granted, it will be conditioned accordingly.

A "giving effect" operating statement for the first seven months of 1956 submitted by applicants shows anticipated savings approximating $37,184 from various economies to result from unification of operations, thus increasing combined net operating revenues to $77,566 for the unified operation, with an operating ratio of 92.8 percent as compared with an operating ratio of 96.2 percent calculated upon the bare sum of the revenues from separate operations. The estimates of many of the items of expected savings are challenged by the rail carriers because applicants' witnesses were unable to provide sound or creditable bases therefor, and because it is argued many of the economies have already been effected by operations under common control.

If the transaction is consummated, some employees will be reassigned to reduce over-time wages; an additional employee will be assigned to safety work and another to claims supervision. All employees of both companies are to be retained. However, there will eventually be a reduction in the office staff of three employees by attrition. An

additional terminal may be established at Springfield, Mass., on land recently acquired by Gilbertville for terminal purposes; in part to eliminate considerable back-haul operation in the observance of gateways. The applicants do not believe that the merged operations will enjoy any substantial increase in freight tonnage beyond that handled by the two companies. The merger, they claim will benefit the public by producing one financially sound company able to provide a better service.

PROTESTANT AND OPPOSING MOTOR CARRIER PARTIES

The motor carriers protesting and opposing the application are common carriers, each operating under one or more certificates issued by the Commission. The evidence in behalf of ten of them, viz., Alvin R. Holmes, doing business as Holmes Transportation Service and or Jones Express, Worcester, Mass., Newburgh Transfer, Inc., Newburgh, N. Y., Taylor's Express Co., Haverhill, Mass., P. B. Mutrie Transportation, Inc., Waltham, Mass., H. T. Smith Express Co., Inc., Wallingford, Conn., National Transportation Company, Bridgeport, Conn., Lombard Bros., Inc., Waterbury, Conn., Downing & Perkins, Inc., Newington, Conn., Westchester Motor Lines, Inc., Tuckahoe, N. Y., and Jackson Transportation Corporation, New York, N. Y., was submitted by means of substantially similar stipulations and exhibits setting forth operating authorities, equipment operated, certain operating statistics, and locations of terminals. Each avers that it performs service throughout the territory covered by its operating authority. Each opposes the application because it believes that Gilbertville's operating authority is dormant, in part; that new competition would result from the proposed merger; and that granting the application would have an adverse effect upon it.

Holmes is authorized to transport general commodities with exceptions, over regular routes between specified

points in Massachusetts, on the one hand, and, on the other, specified points in New Hampshire, Vermont, Rhode Island, and Connecticut, and between certain points in such States other than Massachusetts; and general and specified commodities between points in Massachusetts, Rhode Island, Connecticut, and that part of New York and New Jersey within 20 miles of New York City. It maintains terminals at ten points in the States mentioned, except New York, and Vermont; and operates 68 trucks, 37 tractors, and 101 trailers. Its operating revenues and ratios[1] are as follows: For 1954, $1,888,921, ratio 99.11; for 1955, $2,064,860, ratio 98.05; and for 24 weeks ending June 16, 1956, $1,072,543, ratio 99.96.

Newburgh Transfer, Inc., controlled by Holmes under temporary authority, claims authority so far as here material, to transport general commodities, with exceptions, over regular routes between New York City and Philadelphia, Pa. It is not clear from an examination of its certificates that it has such authority. It operates 11 trucks, 10 tractors, and 26 trailers, and maintains terminals at Newburgh and Philadelphia, and uses the terminals of other carriers at Secaucus, N. J., and Colonie, N. Y. Its operating revenues and ratios are: For 1954, $685,326, ratio 101.2; for 1955, $255,324, ratio 122.2; first quarter of 1956, $64,128, ratio 109.4.

Taylor's Express Co., also controlled by Holmes, is authorized to transport general commodities, with exceptions, over several regular routes between Boston and Haverhill, Mass., and between Haverhill and Lowell, Mass., serving certain intermediate and off-route points; and over irregular routes between Haverhill and Merrimac, Mass., on the one hand, and, on the other, points in Rockingham and Strafford counties, and a portion of Hillsboro County, N. H.

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[1] Operating ratios are stated in percentages of carrier operating expenses to carrier operating revenues.

It maintains a terminal at Haverhill, and, jointly with Holmes, at Lowell and Cambridge, Mass., and operates 15 trucks, 4 tractors, and 7 trailers. Its operating revenue, and ratio are: For 1954, $214,875, ratio 97.3; for 1955, $202,069, ratio 96.3; for 24 weeks ending June 16, 1956, $102,028, ratio 98.7.

Mutrie opposes the application principally to the extent that it would authorize Nelson as the surviving carrier, to transport machinery or liquid commodities in tank vehicles. Mutrie transports such commodities to the extent authorized by its certificates. Insofar as here pertinent, it is authorized to transport general commodities over regular and irregular routes between certain points in Massachusetts, including Boston, and certain points in Rhode Island, Connecticut, Maine, New Hampshire, and New York, including New York City, between New York City, and points in New Jersey within 50 miles thereof, and many different liquid commodities generally between points in an area extending from and including the New England States southward through New York, Pennsylvania and New Jersey to and including a portion of Delaware. It maintains terminals at Waltham, Mass., Wallingford, Conn., Manchester, N.H., Woodbridge and Jersey City, N.J., and Pawtucket, R.I.; operates 391 trucks, trailers, tank vehicles, low-bed, platform and pole trailers, etc., its investment in which is approximately $2,827,040. It employs 246 persons. Its gross revenues and operating ratios are: For 1954, $3,013,885, ratio 96.7; for 1955, $3,463,547, ratio 96.9; and for 1956 to July 1, $1,740,587, ratio 98.7.

Smith is authorized to transport, over regular routes, general commodities, with exceptions, between Meriden and Boston, Carteret, N. J., and four points in Connecticut, between Hartford, Conn., and Sturbridge, Mass., and between Waterbury and Bridgeport, Conn.; over irregular routes, between points in Connecticut, and between Meriden, on the

one hand, and, on the other, nine points in Massachusetts, Passaic, Paterson and Newark, N. J., and points within ten miles of the latter, and Albany, N. Y., and points within ten miles thereof; over irregular routes, heavy machinery, between points in Connecticut, and between Meriden, on the one hand, and, on the other, points in New Hampshire, Massachusetts, Rhode Island, New York, Pennsylvania and New Jersey. It has terminals at Wallingford, New York City and Boston, and operates 6 trucks, 41 tractors, and 75 trailers. Its operating revenues and ratios are: For 1954, $1,194,899, ratio 98.4; for 1955, $1,216,426, ratio 99.6; for first quarter of 1956, $316,126, ratio 96.

National is authorized to transport general commodities, with exceptions, over regular routes between Perth Amboy, N. J. and Hartford serving all intermediate points and the following off-route points: Five in New York, 22 in Connecticut, 6 in Massachusetts, points in Bergen, Essex, Hudson, Union, portions of Passaic and Middlesex, counties, in New Jersey, and points in the New York commercial zone as defined by the Commission; between certain points and off-route points in Connecticut; between New Freedom, Pa., and junction of U. S. Highways 1 and 9, serving, among others, the intermediate points of Baltimore, Camden, and Philadelphia; and finally between certain other points in Connecticut, Massachusetts, and New York. It maintains terminals in Boston, Holyoke, Mass., Hartford, New London, Conn., Bridgeport, Kearney, N. J., Baltimore, Philadelphia, and Lancaster, Pa., and operates 40 trucks, 90 tractors and 150 trailers. Its operating revenues and ratios are: For 1954, $2,730,157, ratio 100.4; for 1955 $2,894,374, ratio 98.9; for the first quarter of 1956, $804,374, ratio 99.0.

Lombard is authorized to transport general commodities, with exceptions, over regular routes generally between numerous specified points, serving numerous intermediate and off-route points, in an area extending from Marcus

Hook, Pa., northward to and including Massachusetts. The area includes parts of Pennsylvania, New Jersey, New York, Connecticut, Rhode Island and Massachusetts. It has terminals at Philadelphia, Elizabeth, N. J., Bridgeport, Waterbury, South Windsor, Conn., Worcester and Boston, and operates 38 trucks, 103 tractors and 128 trailers. Its operating revenues and ratios are: For 1954, $2,561,004, ratio 100; for 1955 $2,580,040, ratio 100.3; for the first quarter of 1956, $779,771, ratio 100.9.

Downing is authorized to transport general commodities, with exceptions, over regular routes between Hartford, Conn., and Lancaster, Pa., serving all intermediate points, and certain off-route points in New Jersey and Pennsylvania, and over irregular routes between points in Connecticut, Massachusetts, a portion of Rhode Island, southeastern New York, and portions of New Jersey and eastern Pennsylvania. It has terminals at Newington (Hartford), Conn., Worcester and Philadelphia, and operates 20 trucks, 40 tractors, 60 trailers, and 8 flatbeds. Its operating revenues and ratios are: For 1954, $1,047,155, ratio 98.9; for 1955, $1,148,710, ratio 102.3; and for the first quarter of 1956, $260,369, ratio 102.4.

Westchester is authorized to transport over regular routes new furniture and certain toys from certain points in Massachusetts to certain points in New York and New Jersey including service to such intermediate points as New York City, Jersey City, Albany, Hartford and Meriden and four off-route points in Massachusetts and New York; over irregular routes, special commodities, such as ladies and children's wearing apparel, new furniture, baby and doll carriages, paint and paint products, and household goods, from, to and between points generally in portions of Pennsylvania, New Jersey, New York, Connecticut, Massachusetts, Vermont, and Rhode Island, and general commodities, with exceptions, between New York City and

Westchester County, on the one hand, and, on the other, points in Fairfield County, Conn. It operates 20 tractors and 24 trailers.

Jackson is authorized to transport over irregular routes, new furniture between New York City and points in New York and Connecticut within 50 miles of Columbus Circle, in that city, and between New York City, on the one hand, and, on the other, Philadelphia and points in New Jersey. It operates 5 trucks, 10 tractors and 14 trailers.

M & M Transportation Company, of Boston, is interested here only in the territory extending from, and including, Rhode Island and Massachusetts on the north to and through New York City to points south thereof. It is not interested in local service between points in Massachusetts, Rhode Island and Connecticut. It is authorized to transport over eight regular routes general commodities, with exceptions, between Boston and Philadelphia serving specified intermediate and off route points in Massachusetts including Springfield, Worcester and 20 mile area, and 25 mile Boston area, Connecticut, including Hartford and New Haven, Rhode Island, including Providence and points in Rhode Island and Massachusetts within 10 miles thereof, Hudson and Kingston, N. Y., Camden, N. J. and points in New Jersey and Pennsylvania within 30 miles of City Hall in Philadelphia, New York City, points in three New Jersey counties, portion of Long Island, Newark, N. J., and points within 25 miles thereof; over regular routes, fish and fish oils from Barnstable, Mass., to New York City; packinghouse products from Boston to Baltimore and between Plymouth and Barnstable, Mass., and New York City; and cranberries from Plymouth and Barnstable to New York City. It maintains terminals with a supply of over-the-road equipment at New York City, Newark, Philadelphia, Springfield, Providence, Worcester and Boston, and operates 190 tractors, 258 trailers and 73 pickup trucks, supplemented

by an average of four leased units per work day. Its investment in transportation facilities, equipment and terminals was $2,188,407 as of January 1, 1956. It employs 850 persons, including 12 solicitors. Its operating revenues and ratios are: For 1954, $7,481,186, ratio 92.5; for 1955, $7,233,531, ratio 95.8; for the first six months of 1955 and 1956, respectively, $3,602,497, ratio 95.96, and $4,330,139, ratio 91.74. M & M provides daily overnight service on both truckload and less-than-truckload shipments between all points. It can meet the public demand for its services and has experienced little complaint. Its assistant traffic manager expressed little more than an awareness of the existence of Nelson and Gilbertville, and testified that M & M is very much interested in the application to the extent that it "would be seriously affected by any new competition in a field already overburdened with competitive factors"; and that there may be 65 to 70 general-commodity-common-motor carriers operating between points in Massachusetts in which M & M is interested and the New York area.

Insofar as pertinent here, Adley Express Company, New Haven, Conn., is, generally speaking, authorized to transport general commodities, with exceptions over some 30 regular routes between Boston and Philadelphia through Connecticut, Rhode Island, New York and New Jersey, serving all intermediate points and as off-route points all points in Massachusetts, Rhode Island and Connecticut, in twelve counties in northern New Jersey, within 15 miles of City Hall, Philadelphia and in the New York commercial zone. It has thirteen terminals and 25 call stations within the area here involved, and operates 205 trucks, 229 tractors and 418 trailers, some of which are stationed at each terminal. Its investment in terminals, equipment and facilities as of January 1, 1956, was $6,644,894. It employs 1,300 persons, including 40 solicitors. Adley's operating reve-

nues and ratios are: For 1954: $9,479,787, ratio 89.4; for 1955, $10,355,065, ratio 94.3; for the first six months of 1956, $5,435,578, ratio 89.6%. It provides overnight service on both truckload and less-than-truckload traffic between all points pertinent here. During 1955 it handled 195,346,443 pounds, and during the first 6 months of 1956, 96,944,939 pounds, of freight between points in Massachusetts, on the one hand, and, on the other, points in New Jersey and Philadelphia and points in Pennsylvania within 25 miles thereof. In this proceeding, it is interested in the intra-New England traffic and that in the area extending southward therefrom to the New Jersey area and Philadelphia. It has experienced some competition from Gilbert's Ide and Byrnes, but not to any extent. There are some 50 or 60 competitive general commodity motor carriers between Massachusetts and Philadelphia. In the Massachusetts-Rhode Island-Connecticut area, there are at least 100 such competitors, about 20 to 25 of whom are substantial. Adley recently acquired the Savage Truck Line operating rights, thus extending its authority south from Philadelphia to Virginia and North Carolina.

Hemingway Brothers Interstate Trucking Company, New Bedford, Mass., is authorized, inso far as pertinent, to transport general commodities, with exceptions, over regular and, in part, irregular routes in the general area from Philadelphia northward served by Adley. Their operations are substantially parallel, except that Hemingway serves New York City and Adley does not. Hence, their interests in the application are substantially the same. It was stipulated that Hemingway's witness would, if called to testify, give substantially the same answers to questions as those given by Adley's witness. Hemingway maintains 15 terminals with road equipment and 62 call stations, in all, the vast majority of which are in the area affected. It operates 98 trucks, 242 tractors and 384 trailers and employs 903

persons. Its investment in terminals, equipment and other facilities as of January 1, 1956, was $2,626,270 against which the outstanding obligations were $837,766. Its operating revenues and ratios are: For 1954, $7,577,087, ratio 96.53; for 1955, $7,476,846, ratio 97.7; and for the first six months of 1955 and 1956, respectively, $3,814,008, ratio 99.43, and $4,242,471, ratio 97.84. It has lost some traffic to Gilbertville destined from two points in New Jersey to points in Massachusetts, most of which it has regained. It attracts business from Gilbertville and other carriers and they from it. Hemingway has acquired extensive operating authority by several purchases.

MC-F-6178

In MC-F-6178, the Bureau of Inquiry and Compliance asserts that the over all picture presented by the evidence amply demonstrates that Nelson and Gilbertville and the other respondents have violated the prohibitions in section 5 against control or management in a common interest of two or more carriers and that the application for approval of the merger is merely a tardy attempt to secure approval of an already unlawfully accomplished condition and that while individually the various incidents and circumstances shown by the record may not be conclusive, collectively, they clearly spell out a continuous existence, since the acquisition by Kenneth Nelson of the Gilbertville shares, of management and operation of the two carriers in a common interest. The Bureau, therefore, recommends a finding that the circumstances revealed by the record require the entry of an order calling upon the respondents to discontinue violation of the provisions of section 5(4) of the act. Although the motor carrier protestants and the motor carrier and railroad parties in interest proclaim their support of the investigation and argue that respondents are in viola-

tion of said section, none introduced evidence thereon and none has requested the entry of any corrective order.

Applicants-respondents argue that the leasing of trucks by one carrier to another, the presence of a list of equipment of the lessor carrier in the files of the lessee carrier to facilitate leasing, the sharing of telephones, and the friendly business relations between carriers engendered by close family relationship, do not constitute control in a common interest; that the few instances of record of the carriage by one carrier respondent of shipments of the other should be ascribed to human error and not given serious consideration; that Kenneth Nelson's continued employment by Nelson as a tariff consultant in 1953 concurrently with his management and operation of Gilbertville did not result in common control or management of the two carriers.

The pertinent part of section 5(4) provides that

"(4) It shall be unlawful for any person," without the approval and authorization of the Commission, "to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, xxx, in any manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or affectuated xxx in violation of" the foregoing provisions. "As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

Paragraph (5) of section 5 declares that any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two or more carriers if such transaction -

(a) is by a carrier and its effect is to place such car-

rier together with persons affiliated with it in control of another carrier;

(b) is by a person affiliated with a carrier and the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) is by two or more persons acting together, one or more of whom is a carrier or affiliated with a carrier, and its effect is to place such persons and carriers and persons affiliated with such carrier or carriers in control of another carrier.

Paragraph (6) of section 5 provides that "a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier xxx it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person, will be managed in the interest of such other carrier." Section 1(3)(b) of the act declares in pertinent part that for the purposes of section 5, the word "control xxx shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation xxx or through or by any other direct or indirect means and to include the power to exercise control."

In *Colletti—Control—Comet Freight Lines (1942)*, 38 M.C.C. 95, the Commission found that a transaction whereby a person in control of a carrier through ownership of 60 percent of its voting stock would become manager of the business of another carrier was subject to the provisions of section 5. In that case the scope of the word control was discussed:

> "Section 5 is remedial in character and should be liberally construed. It is clear that the section was intended to cover acquisitions of control by any means and irrespective of whether or not the person holding

control might legally enforce such control. 'Control' is generally defined to be the power or authority to *manage*, direct, superintend, restrict, regulate, govern, administer, or oversee. Control is frequently said to be synonymous with manage. There is nothing in the act to indicate that the term is used in other than its ordinary sense. It is obvious that there may, and do, exist different types of control. For instance, there may be absolute control which would imply complete dominion over the subject matter; or there may be joint control as where two persons have equal power thereover; there may be direct or indirect control; or there may be actual as distinguished from legal control. The words 'control or management' as used in section 5 embrace all forms and types of control or management. *** The existence of legal control in one person does not prevent concurrent existence of actual control in another through acquiescence of, or a management contract with, the former. The fact that Colletti, theoretically at least, would be subject to the orders of Comet's board of directors does not negative possession by him of actual control within the meaning of the statute." 38 M.C.C. 97.

The history of the broad language contained in section 1(3)(b) and in paragraphs (4), (5) and (6) of section 5 makes it clear that the existence of control must be determined by a regard for the "actualities" of intercorporate and intercarrier relationships and that by investing the Commission with the duty of ascertaining control, Congress did not imply artificial tests of control. One of the kinds of transaction specified in section 5(5) which shall be deemed to accomplish or effectuate the control or management of two carriers in a common interest is a transaction by a carrier, resulting in such carrier and persons affiliated with it, taken together, acquiring control of another carrier.

The definition of affiliation in section 5(6) assumes that the person with respect to whom the question of affiliation arises will acquire control of the carrier in question; but continues with the statement that affiliation of such person with another carrier shall be found if it is reasonable to believe that the carrier, control of which has been or will be effected by such person, will nevertheless be managed in the interest of such other carrier. The definition recognizes that control of the carrier by the person in question does not negative the coexistence of his affiliation with the other carrier. Both may be present and it does not imply affirmative domination of the person by the carrier with which he is affiliated. The term "managed", obviously means "managed in any material degree." *Greyhound Corp.—Investigation of Control-Southern Limited (1946)*, 45 M.C.C. 59, 77-79.

Paragraphs (4), (5) and (6) were planned by Congress in the light of what had theretofore been done through myriad devices without Commission supervision. They are necessary because of the difficulty in establishing as a matter of law in many cases where as a matter of fact it is known that control or management in a common interest of two or more carriers is effectuated or actually exists. Id., p. 77.

Webster's New Collegiate Dictionary defines the verb "manage" as "To control and direct; to conduct, guide, administer" and "To direct affairs; to carry on business or affairs"; and the noun "management" as "conduct; control; direction."

The case in hand appears to be on the borderline. Nevertheless, taking into view all of its many facets in the broad and penetrating light of the statute and its past application, a reasonable conclusion is impelled that control and management of both Nelson and Gilbertville in a common interest were effectuated at some time which cannot be

determined on this record and are presumably continuing. Family ties, of themselves, are not evidence of action to a common purpose. However, the natural and commendable impulse of a member of a family to cooperate with other members in business affairs as in other fields may push the cooperation beyond the permissible bounds of remedial legislation. The family tie provides an urge in addition to the profit motive. Family cooperation, therefore suggests some scrutiny of the inter-relationship of family enterprises in the administration of such legislation as section 5 of the act. There is no doubt that the individual respondent, members of the same family, were affiliated with Nelson or Gilbertville.

Mrs. Linnea Nelson and two of her sons, Oscar and Charles, set up the business of Nelson in 1930. Upon incorporation of the business in February 1948, 496 of the 500 shares authorized were issued to her and one of each four sons, Oscar and Charles Ohlberg and Clifford and Kenneth Nelson. About three months later, she distributed 196 of her shares equally among the sons so that each then had 50 shares. After her death, bequests of 42 shares each were distributed from her estate to each of her seven children, and the corporation bought the six remaining shares. On June 30, 1951, and early in 1953, Oscar sold his 50 and 42 shares, respectively to Charles. On September 22, 1951, and in early 1953, Kenneth sold his 50 and 42 shares, respectively to Clifford. Both Oscar and Kenneth resigned as officers and directors upon the sale of their shares in 1951. Charles and Clifford, having acquired shares from the other devisees, have been and now are the owners of 45.75 percent of the shares outstanding, or 226 each. The other 42 shares are held by a sister, Greta Nelson Carlson.

The sale by Kenneth of his shares and his resignation from office in September 1951, did not mark severance of his connection or affiliation with the company. Apparently,

he continued to occupy office space at Nelson's headquarters in Rockville-Ellington. As a "free lance" tariff consultant he was employed and paid by Nelson over $15,000 in 1952 and over $13,000 in 1953; payments being made upon bills presented periodically by Kenneth. The nature and extent of the services, if any, rendered to Nelson does not appear of record. Nelson was Kenneth's only client.

In January 195", while still consultant for Nelson, he became interested in, and advised with one, Solomon, his accountant and financial adviser, concerning the purchase of all of the capital stock of Gilbertville. Solomon was also accountant and financial adviser for Nelson and the Nelson-Chilberg family and for Gilbertville and Byrnes after they were acquired. On March 1, 1953, Kenneth took control of, and began to operate, Gilbertville. In July 1953, with the help of Oscar's name as co-maker on promissory notes, he financed and completed the purchase. Kenneth became the president and Oscar, to whom 48 shares had been transferred, presumably at Kenneth's direction, became treasurer. A qualifying share was issued to Kenneth's attorney. On April 1, 1954, Oscar who had paid nothing for the 48 shares, transferred them to Kenneth who, in turn and without receiving any consideration, transferred 24 to his wife Phyllis and 24 to Gilbertville's terminal manager at Gilbertville to enhance his "prestige". Kenneth, nevertheless, acknowledged that he beneficially owns and controls such shares. At the same time, Oscar resigned as treasurer and director, and shortly thereafter the terminal manager was elected a director and Kenneth as treasurer (in addition to the presidency). Oscar thereafter devoted himself to the operation of his garage at Philadelphia, which, incidentally, is patronized by Nelson.

Since Gilbertville's "administrative and general" expense for 1953 amounted to only $4,389.37, and since its net after taxes in that year was $20,314.36, a reasonable

inference may be drawn that Kenneth received little or nothing as salary in that year, and, consequently, that his "earnings" of over $13,000 as tariff consultant to Nelson were in the nature of a subsidy to Gilbertville. To offset such an inference we have the statement of the accountant that a portion of the $20,059 shown on its 1953 balance sheet as "Notes payable officers" represents in part unpaid salary owing to him. Even so, the Nelson payment to him in 1953 was at least the equivalent of a loan, without interest, to Gilbertville since it received Kenneth's services without any outlay therefor in that year.

When Kenneth took control of Gilbertville on March 1, 1953, after advising with his accountant and financial adviser, it had a deficit of $39,868. As of December 31, 1953, its assets amounted to $69,383 and liabilities to $50,447 (after net income of $20,314 after taxes), with a net worth of $18,935. The accountant-financial adviser testified that because of Gilbertville's "precarious" financial condition, poor credit standing and insufficiency of working capital, he volunteered advice in January 1954, to Kenneth to seek a merger with Nelson. Thereafter, he repeated his advice, and spoke to Charles Chilberg, president of Nelson of the possibility of such a merger. He suggested merger with none other than Nelson because he knew it was susceptible to a "merger deal" since Charles and Clifford were interested in the expansion of routes to the south. Notwithstanding Gilbertville's "precarious" condition, activity with respect to the suggested merger was suspended while arrangements for two acquisitions were made. By April 28, 1954, arrangements had been made for the purchase by Gilbertville of the operating rights of Louis Mariner, doing business as Wolff's Express, for $7,500 in cash. Pursuant to approval of the transaction by the Commission on June 16, 1954, it was consummated and the purchase price was entered in Gilbertville's books as an intangible asset

to be amortized. In April or May of 1954 Charles Chilberg and Clifford Nelson negotiated the purchase by them of the capital stock of Byrnes, which after approval by the Commission in MC-F-5749 was finally consummated August 21, 1956, with the understanding that after certain tax advantages have been exhausted Byrnes will be merged with Nelson. Meanwhile, Charles and Clifford had been operating Byrnes under temporary authority. Byrnes' general commodity authority complements that held by Gilbertville after its acquisition of Mariner's operating rights. By interchange, Byrnes and Gilbertville can provide a through general commodity service between points in Massachusetts, Rhode Island and Connecticut, on the one hand, and, on the other, points as far south as the District of Columbia.

The accountant adviser testified that when he spoke to Charles Chilberg about the merger in April 1954, he drew attention to the operating economies that could be expected through the elimination of duplications. However, since Gilbertville was running a deficit in earned surplus and Nelson was apparently financially sound; it is not a violent assumption that Kenneth, Charles and Clifford as early as the forepart of 1954 saw in the merger financial advantages to Gilbertville's owner, to whom it was much indebted, and the fulfillment of Nelson's ambitions to expand to the south with the aid of the Byrne's operating rights, if, indeed, Nelson's or the Nelson-Chilberg ambitions to expand had not originally motivated the purchase of Gilbertville by Kenneth. Gilbertville's financial condition at that time was certainly not such as to make it attractive as an investment. As of December 31, 1953, it owed Kenneth $14,792 which had increased to $15,024 by December 31, 1954, and to $20,095 by July 31, 1956. Moreover the promissory note of $30,000 to the Bank signed by Kenneth and Oscar is still unpaid. Another advantage is

that the merger will enable Nelson to transport its narrow range of commodities throughout Gilbertville's general commodity authority areas.

Activities to effect the merger were resumed in January 1955, at a conference between Kenneth Charles Gifford, their attorney and the accountant adviser. On August 18, 1955, the merger agreement was signed and in October 1955, the instant application was filed.

In dealing with the fitness of Nelson to succeed and to exercise Gilbertville's operating rights, some of the opposing motor carriers argue that in order to "condition" the operations of the latter to be acceptable, Nelson sacrificed some of its traffic to Gilbertville and that this circumstance is evidence of management and control in a common interest. They point to the rapid expansion in Gilbertville's operating revenues from $75,489 in 1953, to $423,237 in 1955 and to $444,773 in the first seven months of 1956 as compared with the slower increase of Nelson revenues from $895,774 in 1953–56 $924,607 in 1955 and to $630,607 in the first seven months of 1956. Some of the opposing carriers also assert that of the 1,569 shipments shown on exhibit 26 as moved by Gilbertville, approximately 461 or 33 percent consisted of basic textile commodities such *inter alia* as nylon, cotton, cotton piece goods, etc. However, an examination of the exhibit in the light of Nelson's narrow commodity operating authority (materials used in the manufacture of cloth, waste materials resulting therefrom and supplies and materials used in the transportation or processing of such commodities when moving to or from places of processing) and its limited areas of origin and destination discloses that no more than 15 percent of the shipments could reasonably or lawfully have been transported by Nelson. It is doubtful that Nelson sacrificed much, if anything, in the way of business to build up Gilbertville. However, it may reasonably be in

ferred from the phenominal growth in its revenues that Charles Chilberg and Clifford Nelson and other members of the Chilberg-Nelson family extended a helping hand to Gilbertville in the development of its custom.

An appraisal of the matters related above beginning with the employment of Kenneth by Nelson as a "tariff consultant" after severance of his connections as an officer and share-holder is persuasive that an overall plan or project to create a larger and more significant motor carrier in the New England-Middle Atlantic area using Nelson as a nucleus was conceived and followed. Whether it was conceived before or at the time Kenneth negotiated for purchase of Gilbertville or at some later time is not revealed. Certainly, it commenced to take shape in April or May of 1954 when the Byrnes and Marmer acquisitions first received attention. At any rate, events and the interrelations of the respondent carriers following the purchase of Gilbertville mark their operation as that of a unified organization.

Nelson provides a pool of equipment to which Gilbertville constantly, frequently and readily resorts by means of handy lease forms. Both draw upon the same group of drivers, whose names and other information concerning them were for convenience kept in the files of both. Both occupy the same headquarters and, with few exceptions, use the same telephones. Of a total of six terminals between them, both occupy the same terminals at four points. Three are under lease from Beggson. At two of the four, Gilbertville pays its share of the rentals, at the other two it pays the entire rental. For economy or convenience they carry one another's shipments. It is clear that each operates under some managerial direction from officers or employees of the other. The divisions of revenues on traffic interchanged between them is upon a fixed percentage basis. Nelson does all of the billing on such traffic. By ar-

rangement, interchange of traffic between them is effected by an "interchange" of equipment under lease, whereby the same vehicle and driver accomplish the through movement under leases prepared in advance of such interchange. To some extent Nelson repairs and services motor equipment owned and operated by Gilbertville. Their accounting services and financial advice come from the same source. They are extremely liberal one with the other with respect to debit balances. As of November 5, 1955, Nelson owed Gilbertville approximately $39,000 for interline settlements and Gilbertville owed Nelson some $19,000 in equipment rentals. It may be reasonably inferred that, upon consummation of the merger, if approved, Kenneth Nelson will again join Nelson as a responsible officer or employee. Charles Ohlberg under questioning neither affirmed nor denied that probability, and it is noted that the elimination of Kenneth's salary as president of Gilbertville was not listed among the economies to be effected by the merger.

Although no one of the foregoing acts, practices and arrangements affords a clear indication of control or management in a common interest, they, together with the acquisitions referred to above and the circumstances surrounding them, require a finding that control and management in a substantial degree of Nelson and Gilbertville in the common interest of Nelson and its shareholders and of Gilbertville and its shareholders have been accomplished or effectuated and presumably are being maintained. *Greyhound Corp. Investigation of Control—Southern, Ltd.* (1946), 45 M.C.C. 59, 79; *Ratner Investigation of Control—Novak Trucking Co.* (1954), 55 M.C.C. 104, 109-110.

MC-F-5099

Protestants, including the rail carriers, and the other opposing motor carriers urge denial of the application

for the reason that the proposed merger would not be consistent with the public interest because (1) Nelson is not fit to perform the service under the merged operating rights, and (2) the transaction would result in the creation of a new or different service without showing a need therefor to compete with the established services of protestants and other opposing carriers. The Bureau of Inquiry and Compliance urges denial only upon the ground of want of fitness. Nelson's unfitness is demonstrated, it is said, by the participation of itself and those who control it in accomplishing or effectuating control or management in a common interest in violation of section 5(4) and by Nelson's violations of the act in other respects and of the Commission's safety and other regulations. Mattie, Holmes, Newburgh and Taylor urge denial, but request that if approval is granted it be conditioned upon the cancelation of all regular route, and certain irregular route, authority contained in Gilbertville's certificate as dormant. Applicants-respondents maintain that past violations, if any, do not constitute a bar to the approval of a transaction such as here proposed.

The violations, other than of section 5, as shown by the record, consisted of one instance of destruction of records, about four instances of failure to submit drivers' logs for inspection by Commission investigators, two of failure by drivers to keep their logs properly, and two of driver failure to keep logs, one of failure to require a doctor's certificate of a driver, approximately six of failure to have certain safety equipment on trucks or to keep trucks in safe operating condition, several of operations beyond operating authority by both carriers through failure to observe proper gateways, through carriage of unauthorized commodities or by operation beyond the authorized routes or territory of the carriers. Such violations were discovered during the course of investigations or about

ten scattered days between October 22, 1954, and June 1, 1956, by Commission employees. Appellants-respondents offer in mitigation the statement that when such violations were drawn to Kenneth Nelson's attention, corrective action was taken. However, many of the described violations were committed by or are ascribable to Nelson.

It is true that the Commission has on many occasions found that past violations of the act and the regulations by an applicant are not a bar to the granting of his application for a certificate or of approval of an application under section 5. In *Lieberman Extension of Operations, Michigan (1948)*, 48 M.C.C. 399, 402-404, the violations of record were many and varied, but upon consideration of all of the evidence the Commission found applicant fit. In *Bliss & Co., Inc., Extension—Explosives (1955)*, 64 M.C.C. 299, certain applicants were found fit, notwithstanding previous violations, the Commission stating at page 350 that:

> "There is no inflexible rule by which an applicant's fitness can be determined. Consideration should be given to the nature and extent of past violations of our safety rules and regulations, and of State and city laws and regulations; the effect of such violations upon uniform regulation, the mitigating circumstances shown to exist or to have existed, whether the carrier's past conduct represents a flagrant and persistent disregard of the provisions of the act and our rules and regulations thereunder, and the extent to which the carrier is attempting to take corrective measures to bring its operations in compliance with the law and regulations."

In *Baggett-Control-Walker Hauling Co., Inc. (1955)*, 65 M.C.C. 522, approval of a transaction under section 5 was granted, although control had previously been accomplished in violation of that section. Therein, it was written:

"It is apparent that the parties have, for all practical purposes, consummated the major portion of the transaction, with a purchase price of $1,000,000, reserving for our consideration and approval only the remaining portion involving the purchase of 5 shares of stock for $675, which, obviously, is of little consequence so far as the terms and conditions of the whole transaction and the acquisition of control of the carriers are concerned. xxx The evidence otherwise shows the transaction to be in the public interest, and denial is not warranted solely because of the law violations but our approval is not to be understood as a condonation xxx"

In the case at bar, there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown and the circumstances in which they occurred do not establish a persistent disregard for regulation. Rather, they appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not willfulness. The principals are youthful and are of such caliber that their experiences at the hearing herein can be expected to make them more conscious of and responsive to regulation. They earnestly deny that what has been done in respect of Gilbertville and Nelson amounts to effectuation of control in a common interest and on this record their view on that point cannot be said to be wholly groundless. Such control is not the result of any one act or transaction, but is the result of an evolution and a cumulation of acts, transactions and practices, the ultimate consequence of which may not be readily obvious to the layman. A finding of unfitness by reason of violations is not warranted.

Adley, M & M, and Hemingway maintain on brief that approval would result in the creation of a new general commodity operation extending between all points in Mas-

sachusetts, Connecticut and Rhode Island through appropriate gateways, on the one hand, and, on the other, points in New Jersey, Philadelphia and surrounding areas, defined areas in Maryland and Delaware and in and around the District of Columbia. It is pointed out that Nelson operations are confined by its certificate to a very limited class of commodities in the textile field within the foregoing area, and that the new operation to emerge from the unification of the operating rights of Byrnes and Lewis-Marmer, both lately acquired by the applicants, would bear little, if any, resemblance to the very limited operations conducted under the various rights previously in separate ownership. Adley et al., by an analysis of an exhibit placed in the record by Gilbertville upon which are listed approximately 1,400 shipments handled by it between May 1 and May 11, 1956, attempt to show how the pattern of its operations has already changed since its acquisition by Kenneth Nelson on March 1953 from intrastate in Massachusetts and intra-New England to the New England-New York City area. M & M, Adley et al. and Hemingway assert that collectively they provide service between all major areas involved in the application and that they have experienced no serious competition from Gilbertville. Nothing is said concerning any competition expected from Gilbertville-Byrnes' operations between the New England area and the New Jersey, Pennsylvania, Maryland, District of Columbia areas.

Mitrie, Holmes, Newburgh and Taylor, in their brief, also contend that Gilbertville's pattern of operations has changed and that approval would engender a new service unlike the previous services without any proof of public need therefor. Holmes holds cross-haul authority to transport general commodities between all points in Massachusetts, Rhode Island, Connecticut and New York City and points within 20 miles thereof. Thus, operations in-

stituted under Gilbertville's certificate are claimed to be competitive with and detrimental to Holmes' operations and are new competition inspired by Gilbertville while in violation of section 5 of the act. Also, it is said, approval would authorize a new operation and new competition by Nelson between Massachusetts and Rhode Island points and Philadelphia in direct competition with the Holmes-Newburgh through service. As already mentioned, it is not clear that Newburgh's certificate authorizes operation by it between New York City and Philadelphia.

None of the other six opposing motor carriers filed briefs but announced at the hearing their opposition upon the general grounds that each operates to the extent of its operating authority, each believes Gilbertville's operating authority to be dormant in part and that the new competition to result from the merger would have an adverse effect upon it.

The eastern territory railroads say that the merger would enlarge Nelson's operating authority to some extent territorially and give it a vastly expanded commodity authority without proof of public need; that existing motor carriers are providing adequate service and that the application should be denied for these reasons, in addition to that for lack of fitness.

The evidence indicates that there are some 50 to 60 general commodity motor carriers competing for traffic between Massachusetts and Philadelphia, and at least 100 such carriers, 20 to 25 of whom are substantial, competing in the Massachusetts-Rhode Island-Connecticut area.

The difficulty with the basic opposition is that the competition which is feared is either already an accomplished fact or capable of becoming so even though the present application is denied. Gilbertville could still continue its operations under its general commodity authority intra-New England and between that area and the New York

City New Jersey areas. It could still inaugurate, if it has not done so already, or continue interchange with Byrnes in the New York City area, providing through service between the New England points and those south of New York City. Denial of the application would not frustrate such competition.

Moreover, the competition is handicapped and would continue to be notwithstanding approval of the applications by the requirements for observance of Gilbertville's principal pres nt gateway restrictions. To provide service under general commodity authority between Massachusetts points, on the one hand, and, on the other, New York City and points in New York and New Jersey within 20 miles thereof, all operations must be conducted through the Town of Hardwick. Between any point in Massachusetts and any point in Rhode Island or Connecticut operations must pass through Palmer or within 10 miles thereof. Service may not be provided between any point in Rhode Island or Connecticut, on the one hand, and, on the other, New York City or any point in New York or New Jersey within 20 miles thereof without operations through that part, if any, of the Town of Hardwick situated within 10 miles of Palmer. *Aetna Freight Lines, Inc., Interpretation of Certificate (1948)*, 48 M.C.C. 610; *La Mere and Conroy Purchase-Ziffrin (1949)*, 55 M.C.C. 501, 511. Through service, under Gilbertville's general commodity authority, except insofar as it may now lawfully be provided by interchange with Nelson, may not be provided between Rhode Island and Connecticut. *G. & M. Motor Transfer Co., Inc., Common Carrier Application, (1944)*, 43 M.C.C. 497, 500.

The evidence shows a tremendous increase in Gilbertville's business from 1953 when operating revenues were $75,489 as compared with the first seven months of 1956 when they were $444,777. Notwithstanding, none of the op-

posing carriers offered evidence of any loss of traffic by them to Gilbertville from 1953 to August 1956. Mutrie and Holmes as well as Adley, M & M and Hemingway are of the opinion that this increase in traffic is illegal because it was developed under a unified control and at the expense of Nelson and, hence, should be given no consideration as evidence of consistency with the public interest. As seen, the evidence does not bear out a sacrifice on Nelson's part, perhaps because there are not very many origin-destination combinations common to the operating authorities of the two carriers with respect to Nelson's narrow range of commodities. To what extent, if any, Gilbertville's increase in traffic is ascribable to the unified managment, it is impossible to determine from this record. Moreover, if it be assumed that the increase is directly traceable to such management, neither the increase nor the operations conducted in handling the traffic involved can be said to be illegal.

Insofar as the record here reveals any facts upon the subject, it shows that neither the motor carrier nor railroad opponents will be adversely affected to any appreciable extent by the merged operations. Cf. *Kaplan Trucking Co. Purchase Hessler Cartage Co.* (1956), 70 M.C.C. 1, 3. At any rate, all are well established in the areas involved and should be able to meet in the future as they have in the past the additional competition from Nelson under the unified rights.

Although applicants' witnesses indicated that if the operations of the two carriers had been unified during the first seven months of 1956, savings estimated at over $37,000 would have been realized from various economies, since the witnesses were unable under cross-examination to substantiate the amounts to be saved as to some of the items, it is doubtful that the savings would reach that total. However, the evidence shows that a substantial amount

would be saved. This, together with the projected improvements in transportation services from the elimination of gateway observance on certain traffic presently interchanged, in loss and damage claim services, and in safety of operations and the establishment of a new terminal at Springfield are in the public interest and consistent therewith.

Murrie and Holmes, Adley, M & M, and Hemingway point out that the evidence fails to show any operations whatever over Gilbertville's general commodity regular routes between Boston and Lowell or to and from the intermediate and off-route points appurtenant thereto or over its irregular routes between points in Massachusetts, that the operating authority therefor is dormant and should be canceled since resumption of operations thereunder by Nelson would confront them with new competition contrary to the public interest. Holmes and Taylor's, claiming general commodity rights in the latter to operate between New York City and Philadelphia, include Gilbertville's authority to haul sanitary napkins, facial tissues and paper boxes over regular routes from New York to Philadelphia with the above-mentioned authority to be canceled. The same criticism is made and the same disposition is requested with respect to the following irregular route authority contained in Gilbertville's certificate:

Pickled skins, from New York, N. Y., to Ipswich and Peabody, Mass.;

Pulpboard, from Boston, Mass., to Hardwick, Mass.;

Fertilizer and fertilizer materials, from Portland, Conn., to Hardwick, Mass., and points in Massachusetts within 15 miles of Hardwick;

Lime and Limestone products, from Adams and Lee, Mass., to Hamden, Hartford, and East Hartford, Conn., Providence and Woonsocket, R. I., New York,

N. Y., and points in New Jersey within ten miles of New York, N. Y.;

Agricultural commodities, from Hardwick, Mass., to Melrose, Conn., and New York, N. Y.

Applicants attached an exhibit to their application containing a list of some 3,500 shipments moved by Gilbertville in the months of March and May 1955, and also submitted in evidence an exhibit listing approximately 1,400 shipments moved by it in the period May 1—11, 1956, which lists, Kenneth Nelson testified, were fairly representative of all of Gilbertville's operations. An examination of the exhibits shows no shipments transported in regular route service under any of its regular route authority, and none of any of the specified commodities between any of the points named or described in the above-quoted portion of its certificate. It must, therefore, be concluded that the operating rights just referred to are dormant and should be canceled if the proposed transaction is consummated. Approval thereof will be conditioned accordingly. The two exhibits reveal service by Gilbertville within the State of Massachusetts between interchange points therein on the one hand, and, on the other, an unascertainable number, less than 40, of origin or destination points therein. It cannot, therefore, be concluded that the authority to operate between points in Massachusetts is dormant.

Employees would not be adversely affected by the transaction. The increase in Nelson's fixed charges would not be contrary to the public interest. The findings herein will be conditioned to require that Nelson shall write off immediately following the consummation the amount which would be assigned to its "Other Intangible Property" account as a result of the acquisition and merger. Following the usual practice in such cases, the amounts to be recorded on its books as a result of the transaction will not be approved at this time, but will be reserved for con-

sideration upon receipt of the statement to be filed as required by the order herein showing all expenditures and the accounting proposed to record the transaction.

In No. MC-F-6099, the Commission should find that the acquisition by the L. Nelson & Sons Transportation Co., of control of Gilbertville Trucking Co., Inc., through acquisition of its capital stock by exchange, the concurrent merger into the former of the operating rights and property of the latter for ownership, management, and operation, and the acquisition by Charles G. Chilberg and Clifford J. O. Nelson of control of the operating rights and property through the control and merger, upon the terms and conditions set forth, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) and will be consistent with the public interest and that, if the authority herein granted is exercised, The L. Nelson & Sons Transportation Co. will be entitled to operate under that portion of the operating rights in No. MC-87431 described in appendix A hereto, to be embraced in a certificate in its name, with duplications, if any, eliminated; provided, however, (1) that the portion of the operating rights in No. MC-87431 not described in appendix A shall be canceled concurrently with the exercise of the authority herein granted, and (2) that The L. Nelson & Sons Transportation Co. shall immediately write off the amount assigned to its "Other Intangible Property" account as a result of the transaction, such writeoff to be accomplished in the manner to be determined upon the submission of a statement showing all expenditures and accounting proposed to record the transaction, as required by our order herein.

In No. MC-F-6178, the Commission should find that The L. Nelson & Sons Transportation Co., Gilbertville Trucking Co., Inc., Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson and Kenneth A. H. Nelson effectuated or par

ticipated in effectuating the control and management of the L. Nelson & Sons Transportation Co. and Gilbertville Trucking Co., Inc., in the common interest of such carriers and of the individuals named above, and that all of them participated in the continuance of such control and management, in violation of section 5(4) of the act. In view of the conclusions in No. MC-F-6099, however, the investigation proceeding will be terminated by the order herein subject, however, to reopening for further proceedings in the event that the transaction in No. MC-F-6099 is not consummated and such control and management appears not to have been discontinued.

An appropriate order should be entered.

APPENDIX A

Operating authority authorized to be acquired and retained by The L. Nelson & Sons Transportation Co.

IRREGULAR ROUTES:

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between points in Massachusetts,

Between the Town of Hardwick, Mass., on the one hand, and on the other, New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y.

Sanitary napkins, facial tissues, and *machinery,*

From Hardwick, Mass., to Boston, Mass., New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y.

Materials used or useful in the manufacture and sale of sanitary napkins and facial tissues,

From New York, N. Y., and points in New York

and New Jersey within 20 miles of New York, N. Y., to Hardwick, Mass.

Return with no transportation for compensation, except as otherwise authorized, to above-specified origin points.

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Connecticut and Rhode Island;

Between Palmer and Monson, Mass., on the one hand, and, on the other, points in Massachusetts within five miles of Palmer and Monson.

Household goods as defined by the Commission.

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Vermont.

Household goods.

Between Hardwick, Mass., on the one hand, and, on the other, points in Connecticut, New Jersey, New York, and Rhode Island.

Livestock.

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Vermont.

APPENDIX B

Interstate Commerce Act § 5(2), As Amended, 63 Stat. 485 (1949):

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . .

(b) Whenever a transcation is proposed under subparagraph

(a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public

hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. . . .

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; and (4) the interest of the carrier employees affected. . . .

Interstate Commerce Act § 5(4), As Amended, 54 Stat. 907 (1940):

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and para-

graph (5), the words "control or management" shall be construed to include the power to exercise control or management.

Interstate Commerce Act § 5(5), As Amended, 54 Stat. 907 (1940):

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any such affiliated carrrier, taken together, in control of another carrier.

Interstate Commerce Act § 5(6), As Amended, 54 Stat. 908 (1940):

(6) For the purposes of this section a person shall be held to be affiliated with a carrier, if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any

other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

Interstate Commerce Act (§ 5(7)), As Amended, 54 Stat. 908 (1940):

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12) inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to the part shall apply to such a violation by any other person.

Administrative Procedure Act (§ 7(c)), 60 Stat. 241 (1946):

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.

Administrative Procedure Act (5(b)),
60 Stat. 242 (1946):

. . . . All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Procedure Act (10(e)),
60 Stat. 243 (1946)

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to a trial *de novo* by the reviewing court. In making the foregoing determinations the courts shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.